Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

David D.,

Petitioner,

v.

New Jersey Division of Youth and Family Services *ex rel.* M.D. and K.D., minors,

Respondent.

On Petition For Writ of Certiorari
To The Superior Court of New Jersey,
Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A New Jersey court has entered a judgment of abuse against petitioner which effectively precludes his parental relationship with his young daughters and places his name in a state maintained child abuse registry. Two complaining witnesses, one 16 years old and the other 17, were each questioned by the court in a collegial setting at counsel's table. As this occurred, petitioner's attorney sat silently in the rear of the spectator gallery and was permitted only to suggest follow-up questions after an initial round of questioning, and petitioner was relegated to a room one floor below with no audio or video feed of the testimony and no way to communicate with his attorney.

The following questions are presented:

1. Whether, in the context of a proceeding threatening his fundamental liberty interest in parenting and his official branding and registration as a child abuser, the foregoing procedure deprived him of personal confrontation of the witnesses guaranteed under the Due Process Clause?

2. Whether, in the context of petitioner's fundamental liberty interest in parenting and being free from unfounded official branding and registration as a child abuser, the foregoing procedure violated his guaranty under the Due Process Clause to have adversarial witnesses cross-examined on a question-by-question basis by counsel of his choice?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

David D., the New Jersey Division of Youth and Family Services, and M.D. and K.D., minors.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David D. respectfully prays for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division, in this case.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division (App., *infra*, 2a-25a) and the order of the Supreme Court of New Jersey denying a petition for certification (App., *infra*, 1a) are not reported.

JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division, was entered June 1, 2009. The Supreme Court of New Jersey denied a timely petition for certification from this judgment on October 6, 2009. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(a) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." *U.S. Const.* amend. XIV § 1. Pursuant to Supreme Court Rule 14.1(f), the provisions of New Jersey's statute

permitting testimony by juvenile witnesses in certain cases by closed circuit television, *N.J. Stat.Ann.* 2A:84A-32.4, is set forth at App., *infra*, 198a-199a.

STATEMENT OF THE CASE

On June 8, 2008, a New Jersey court entered a judgment of abuse and disposition order against petitioner David D., a Minnesota resident, upon application by respondent Division of Youth and Family Services (DYFS). The judgement and order continued in force preliminary restraints entered on February 15, 2005, which have had the effect of cutting off petitioner's access to his young daughters, K.D. and M.D. The judgment was based on the court's finding that petitioner had sexual contact with Taylor Smith, the daughter of petitioner's ex-wife, Ronda Cichielo, on one instance in August 2001. As a consequence of the finding, the court ruled that petitioner posed a risk of harm to K.D. and M.D., his biological children with Cichielo. App., *infra*, 196a-197a.

The court's finding occurred because petitioner was not allowed to confront Taylor and her friend, Wanda Kemp, personally as they testified, and his attorney was not permitted to cross-examine them.[1] Accordingly, petitioner was unable to confront Taylor with her conflicting, vague accounts of a very fleeting

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[1] In accordance with state law, Taylor and Wanda are being referred to by fictitious names. Of the two, only Taylor was a subject of this action, and she has been dismissed from the litigation by the court.

act, her intense dislike of petitioner, and her mother's timing of the complaint to coincide with the conclusion of acrimonious divorce proceedings. Petitioner also was unable to compel Wanda to relate the pressure which Cichielo and Taylor placed upon her to testify and challenge the authenticity of a critical typed statement which she purportedly authored. When they testified, Taylor and Wanda were 16½ and 17½ years old, respectively. No adequate basis existed for the court's confrontation restriction. To this date, after two trials and three appeals, petitioner has yet to confront, cross-examine or even watch by video feed two witnesses who have made vile accusations against him which have placed his fundamental rights in jeopardy.

The preclusion of personal confrontation and cross-examination in this case is a occurrence in intervention actions brought by child protective agencies across the United States. Because this Court has not issued a specific standard establishing the measure of confrontation to which parents are entitled under the Due Process Clause in such actions, the states have pursued a variety of conflicting approaches which in most cases have seriously undermined the accused's fundamental liberty interest in parenting, his children's right in a parental relationship which is free from unwarranted official intrusion, and his significant interest in avoiding unfounded official branding and registration as a child abuser. In light of the damaging impact of the various approaches to these fundamental rights and interests and the nationwide scope of the issue, this Court's review of this matter is urgently needed.

The allegations which gave rise to DYFS's complaint were brought to DYFS's attention on January 20, 2005 by Pauline Dessertine, a registered nurse and family therapist who had counseled petitioner, Cichielo and Taylor. At the time, M.D. and K.D. were four and three years old, respectively. Taylor was 13½ years old. Taylor's mother, Cichielo, had been divorced from petitioner in an order entered earlier that day in Minnesota.

Dessertine reported an incident which supposedly occurred 3½ years earlier, on August 23, 2001. At the time of the incident, petitioner, Cichielo, Taylor and M.D. were living together in a house in New Jersey. Taylor, born August 5, 1991, was 10 years old. M.D., born October 1, 2000, was an infant. K.D. would be born four months later, on December 7, 2001. App., *infra*, 86a, 176a.

On the evening of the incident, petitioner decided to sleep on the couch in the basement because his back was bothering him. As he was reading a book, Taylor came down to the basement to sleep on the floor on a sleeping bag because it was too hot upstairs. After Taylor dropped off, petitioner turned off the light and fell asleep. App., *infra*, 99a, 129a-130a, 181a.

Between 11:30 and 12:00 a.m, something woke Taylor and alarmed her. She went upstairs, woke Cichielo and told her that something had happened with petitioner in the basement. According to Cichielo, Taylor told her words "to the effect" that petitioner, while naked, had rubbed his penis on her face. Taylor

also stated that "something" had gotten on her face and that it had a "really bad smell." Cichielo sniffed Taylor's face and neither smelled nor detected anything unusual. App., *infra*, 86a-89a, 181a).

Cichielo woke petitioner, who denied the complaint. They discussed whether Taylor had reacted to one of her disturbing recurring dreams about her paternal grandfather which had caused bouts of sleepwalking and then spoke with Taylor in their bedroom. According to Cichielo, Taylor at the end of the conversation stated, "You know, maybe it was a dream." App., *infra*, 89a-91a, 129a-130a.

Cichielo then put Taylor to bed. Before Taylor fell asleep, she complained that the odor she smelled earlier was on her blanket and pillow and was "making [her] gag." Cichielo knelt down to sniff the blanket and pillow but could not detect anything unusual. App., *infra*, 89a-90a.

Cichielo accepted that nothing inappropriate had happened to Taylor and continued to reside with petitioner. The marriage began to unravel during a prolonged period of unemployment by petitioner between January 2003 until April 2004. Petitioner had been terminated from his management job with Roche Diagnostics when 22 gigabytes of data were discovered saved on his work computer. The titles of most of the files suggested they were pornographic. A friend had e-mailed the files to petitioner in large batches over several days. Petitioner had not received a password to open the files and had forgotten they

were still on his computer.[2] App., *infra*, 75a-77a, 131a-134a.

Petitioner did not immediately relate the real reason for his termination to Cichielo, and she was furious when she found out. Beginning in February 2004, petitioner and Cichielo had 11 marriage counseling sessions with Dessertine, a licensed nurse and counselor. App., *infra*, 56a-57a, 61a.

Coincident with this crisis, petitioner obtained a position as product manager with a firm in Minnesota. Taylor was very unhappy about moving, and serious discord developed between her and petitioner. Taylor joined petitioner and Cichielo in some of the counseling sessions with Dessertine. App., *infra*, 57a-62a.

On April 1, 2004, petitioner moved to Minnesota and set up a residence for the family. Five days later, Taylor had a therapy session with Dessertine in which she stated that she had never liked petitioner and never would. Taylor did not relate anything about the alleged incident in the basement in August 2001 or claim that petitioner abused her in any other way. App., *infra*, 62a-63a.

After a few weeks, petitioner picked up M.D.

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[2] A miniscule amount of the files saved -- .174%, a percentage consistent with inadvertent inclusion -- contained the domain name of a child pornography website. App., *infra*, 6a, 11a. Petitioner has not been criminally charged with possessing child pornography.

and K.D. in New Jersey and took them back with him to Minnesota. Cichielo and Taylor joined them one month later. The relationship between petitioner, Cichielo and Taylor in Minnesota was tumultuous, and the two fought frequently. Their disputes were a source of heated arguments between petitioner and Cichielo. On June 14, 2004, Taylor had a telephonic therapy session with Dessertine to discuss her disputes with petitioner. Again, Taylor did not allege that petitioner abused her. App., *infra*, 63a-65a.

In September 2004, Cichielo told Taylor that a divorce between her and petitioner was imminent; accordingly, Taylor should now inform her of any inappropriate conduct by petitioner. According to Cichielo, Taylor stated that she did not have anything new to relate about her and petitioner, but that petitioner had acted improperly with Wanda, Taylor's best friend in New Jersey, by taking off his shirt and "propositioning" her. App., *infra*, 182a.

On October 1, 2004, petitioner filed for divorce. The family continued to reside together. In November 2004, the acrimony between petitioner and Taylor became so severe that Taylor was sent to live with her biological father. Cichielo remained in Minnesota with M.D. and K.D. so that she could negotiate terms of divorce. App., *infra*, 91a-93a.

In December 2004, petitioner and Cichielo signed an agreement which provided for joint legal custody of M.D. and K.D. and alternating six month periods of physical custody of the children. Cichielo was dissatisfied with these terms and only signed the

agreement so she could leave for New Jersey. *Ibid.*

Several days later, Cichielo left M.D. and K.D. with petitioner and moved to New Jersey. On December 23, 2004, Cichielo and Taylor had a counseling session with Dessertine in her office. Neither Cichielo nor Taylor mentioned anything about petitioner's alleged commission of sexual abuse. On December 31, 2004, petitioner surrendered M.D. and K.D. to Cichielo in New Jersey in accordance with the settlement agreement. App., *infra*, 68a-69a, 93a.

On January 11, 2005, Cichielo and Taylor appeared at Dessertine's office for a therapy session. Cichielo told Dessertine that Taylor would reveal an important, painful secret during next week's therapy session, which Dessertine had planned on conducting alone with Taylor. At the time, the settlement agreement had not been formally ratified and Cichielo knew that Dessertine would have to report any allegation of abuse. App., *infra*, 58a, 69a, 71a, 92a-93a.

On January 18, 2005, Cichielo showed up unexpectedly at the therapy session with Taylor, explaining that Taylor was unable to reveal her secret alone. The divorce decree had been formally approved as to content by petitioner's Minnesota matrimonial attorneys on that date, but the decree had yet to be entered by the court. Taylor proceeded to inform Dessertine that petitioner had touched her face and lips with his penis. She did not believe he had an erection. She alleged this was done on *three* separate instances. App., *infra*, 59a-60a, 70a-71a, 188a.

Dessertine waited two days and then called DYFS's child abuse hotline to report Taylor's allegation. DYFS's records indicate that the call was made at 6:32 p.m. on January 20, 2005, the day the divorce decree was entered by the court in Minnesota and shortly after the courts would have closed in that state. DYFS referred the matter to the county prosecutor's office. App., *infra*, 58a, 71a, 75a, 188a, 189a.

On January 25, 2005, detectives conducted a tape recorded interview of Taylor. Taylor repeated her allegation that petitioner had rubbed his penis against her face. However, she now claimed this conduct took place on two, not three, separate occasions, and that it occurred during the course of one day several years earlier. Pressed as to the details of this event, she related that she woke up and saw petitioner "like walking around, like naked and stuff." He turned off the TV, knelt down beside her and "like, uh, rubbed his penis on my face and stuff." He proceeded to sit on the couch in the basement and then returned and "did it again." App., *infra*, 167a-172a.

Taylor admitted she "was already about like half asleep" during the first instance of contact. She said this instance lasted "like a couple of seconds." Taylor stated she "didn't think really anything of it cause I just figured, well, that's just a dream or something." *Ibid.* She stated the second instance lasted perhaps five seconds. Regarding both instances, Taylor stated that petitioner's penis did not touch her lips and was not hard when he rubbed her with it; only days earlier, she had told Dessertine it had touched

her lips. *Ibid.*; App., *infra*, 188a.

On February 15, 2005, DYFS filed its complaint on this action. The court on that date entered a preliminary order placing the children in DYFS's custody and care and supervision and restraining petitioner from visiting with M.D. and K.D. except under DYFS's supervision. App., *infra*, 7a. As petitioner resided and worked in Minnesota, the order, the terms of which continue in effect, had the consequence cutting off petitioner's access to his daughters. It also allowed Cichielo to retain the financial aspects of the marital settlement agreement while being relieved of its unwelcome custodial and visitation obligations.

The prosecutor's office proceeded with its criminal investigation. Wanda's parents refused to allow her to be interviewed. The prosecutor's office reviewed an unstipulated polygraph test conducted by the former chief of detectives of a neighboring county prosecutor's office which indicated truth in petitioner's denial of guilt. In July 2005, the prosecutor's office informed petitioner that it was declining to pursue criminal charges.[3] App., *infra*, 55a, 189a-193a.

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[3] Anticipating the restriction on confrontation in this case and desperate to retain some means of establishing the truth, petitioner fruitlessly requested the trial court to direct DYFS to subject him to a *stipulated* polygraph conducted by the New Jersey State Police or the Hunterdon County Prosecutor's Office, placing him in jeopardy of prosecution and imprisonment if he failed the test. DYFS had rejected petitioner's offer to submit to such a procedure. App., *infra*, 186a-187a.

DYFS forged ahead with its complaint, and an initial trial commenced on August 9, 2005. Regarding the alleged sexual contact, Taylor now claimed that petitioner rubbed her face with his penis only once, not three times as she had alleged to Dessertine, or twice as she had reported to the detectives. She stated that she squinted and closed her eyes and tried not to look when the sexual contact occurred. She specified that the area of her face rubbed was her right cheek and right forehead, not her lips. App., *infra*, 159a-166a.

The trial court found that petitioner had committed abuse and neglect by having "inappropriate sexual contact" with Taylor, thereby establishing a risk of harm to M.D. and K.D. Petitioner appealed, in part claiming that the procedure used to take Taylor's testimony violated the Due Process Clause. A panel of the Superior Court of New Jersey, Appellate Division, reversed on the basis of petitioner's Due Process Clause claim and because New Jersey lacked an emergent basis to alter Minnesota's custody decree without a transfer of jurisdiction and. App., *infra*, 26a-36a.

DYFS obtained the required jurisdiction. Before a re-trial commenced, a different Appellate Division panel heard an interlocutory appeal brought by petitioner and provided guidelines for the examination of Taylor. The panel ruled that the court could elect, at its discretion, to "re-interview" Taylor in chambers instead of the courtroom. If the court opted for an *in camera* interview, all counsel needed to be present or be able to observe her contemporaneously by video link. The questioning would be conducted by the

court, and counsel would have the opportunity to submit additional questions after the initial portion of the interview. App., *infra*, 37a-45a.

The retrial commenced in early March 2008. At the time, Taylor was less than five months shy of her seventeenth birthday. Dessertine submitted a letter to the court a few days before trial, in which she said Taylor did not want petitioner to be present and was concerned that cross-examination "might be hostile." Dessertine "concurred" that defendant's presence could be intimidating and requested that the court ask the questions. The letter did not indicate that Taylor would suffer distress or enduring trauma if she were to testify in defendant's presence. To the contrary, Dessertine "found Taylor to be a rather mature and stable adolescent" and agreed she was ready to testify in the courtroom. App., *infra*, 194a-195a.

At the outset of the trial, petitioner's counsel demanded that he be permitted to cross-examine Taylor in open court with petitioner present. The judge disagreed on the basis of Dessertine's letter. App., *infra*, 50a-55a. When Taylor appeared, the judge sat with her in a collegial session at counsel's table and posed all questions. Petitioner's counsel sat mutely with the other attorneys in the spectator gallery. Petitioner was placed in a room one floor below with no audio or video feed of the testimony and no way to communicate with his counsel. App., *infra*, 80a-82a.

In her testimony, Taylor presented still a different version of events. She stated that after

falling asleep on the floor, she was awoken by petitioner rubbing his penis on her face. As in the first trial, Taylor stated that petitioner rubbed his penis on her face "just once," in an encounter lasting only "a few seconds." However, in contrast with all her previous statements, Taylor now claimed that petitioner's penis was hard. App., *infra*, 100a-101a, 103a. Moreover, she now said that a light by petitioner's desk was on when the contact occurred but the television was off. She said that after the contact, petitioner went to the desk, turned off the light, sat down on the couch and turned on the TV. During the first trial, she had claimed the TV was on when she woke up but that no lights were on and it was "pitch black." App., *infra*, 101a, 157a-159a.

After an initial round of questions, Taylor left the courtroom, and the attorneys verbally suggested additional questions. Taylor was then recalled and the judge posed questions modeled on the suggestions. As for petitioner's counsel's proposals, the judge's questions lacked critical focus requested by counsel. Moreover, the judge did not follow up several of Taylor's responses by specifically confronting her with inconsistent remarks pointed out by counsel, and failed to ask her a key question regarding the inconsistency between her initial claims to Dessertine and the police that petitioner had touched her three times or twice and her assertion at trial that the contact had occurred once.[4] App., *infra*, 108a-124a.

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[4] Additionally, the court did not confront Taylor with her earlier inconsistent assertions where she was touched, asked her bland, open-ended questions regarding her feelings toward

Generally, the procedure was a discussion, not a probing examination.

Wanda had not testified at the first trial. In the retrial, she did not testify in DYFS's case-in-chief. Instead, Wanda's step-mother, Jody Kemp, testified and identified Wanda's signed statement, dated five days before the first day of trial, which in format and writing style appeared to have been prepared by an adult. In the statement, Wanda purported to assert that petitioner had exposed himself to her in the basement of his house nearly three years earlier while she was babysitting. No reference was made to any type of proposition. Kemp said Cichielo had asked her three weeks before the hearing for the statement so that it could be used in lieu of Wanda's testimony. Wanda only gave the statement so that people would stop pressuring her to testify. App., *infra*, 83a-85a, 184a-185a.

Petitioner took the stand and denied abusing Taylor or Wanda. App., *infra*, 129a-130a, 134a. *Over petitioner's counsel's clear objection*, the court permitted Wanda to testify in rebuttal under the identical unusual procedure used with Taylor. App., *infra*, 136a-139a. At the time of her testimony, Wanda was nearly 17½ years old. The court did not even allude to any possible emotional distress on her part in testifying; it simply opined that it saw no reason why Wanda should testify under different conditions than Taylor. *Ibid.* With the court posing all the questions,

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petitioner and did not confront her with her conflicting prior statements regarding the lighting conditions in the basement.

Wanda essentially affirmed her statement. App., *infra*, 141a-144a.

Following an initial round of questions, Wanda was excused from the room, and the court solicited questions from the attorneys in the spectator gallery. When Wanda resumed her place at counsel table with the court, the court's questioning was even more inadequate than was the case in Taylor's testimony, with the court neglecting to ask most of the questions suggested by petitioner's counsel. App., *infra*, 145a-155a.

On April 17, 2008, the court ruled that petitioner "committed a sexual abuse act upon" T.S. and posed "a risk of sexual harm" to M.D. and K.D. In reaching this decision, the court asserted that it found Taylor and Wanda credible. App., *infra*, 11a, 196a-197a.

Defendant again appealed to the Appellate Division, maintaining that the court's preclusion of personal confrontation and cross-examination of Taylor and Wanda violated the Due Process Clause. On June 1, 2009, a third panel found that the examination procedure comported with due process, because the court had wide discretion to formulate procedures to protect minors and petitioner's attorney had been allowed to present questions. App., *infra*, 2a-25a.

Petitioner filed a petition for review of the panel's ruling. By order entered October 6, 2009, the New Jersey Supreme Court denied review. The

instant Petition for *Certiorari* follows. App., *infra*, 1a.

REASONS FOR GRANTING THE WRIT

I. Review is Warranted Because the Case Presents Important Questions of Federal Law that Have Not Been Settled By This Court, and Their Lack of Resolution Has Given Rise to Varied Standards and Results Across the Country Which Violate the Due Process Clause and Do Violence to the Fundamental Liberty Interest in Parenting

This Court has never specifically addressed, let alone decided, whether and to what extent an accused parent in a child protection agency intervention action is entitled to confrontation under the Due Process Clause. The issue has nationwide impact and is of imperative public importance. Every state has an agency charged with exercising the state's *parens patriae* responsibilities by intervening in parental relationships to protect distressed children. In a misguided attempt to protect such children, courts across the nation have issued rulings reducing or even eliminating the personal confrontation of complaining child witnesses or their confrontation through cross-examination.

The decisions to restrict confrontation clash

with fundamental principles which this Court has long recognized. This Court has ruled that a parent's interest in "the companionship, care, custody and management of [his] children" is a fundamental liberty interest under the Fourteenth Amendment. *Stanley v. Illinois*, 405 *U.S.* 645, 651, 92 *S.Ct.* 1208, 1212, 31 *L.Ed.2d* 551, 558 (1972). This Court also has indicated that in almost every setting where important decisions turn on questions of fact, due process requires the opportunity to confront and cross-examine opposing witnesses. *Goldberg v. Kelly*, 397 *U.S.* 254, 269, 90 *S.Ct.* 1011, 1021, 25 *L.Ed.2d* 287, 300 (1970) (welfare recipients challenging termination of benefits).

Furthermore, the restrictions undermine the essential function which confrontation plays in ensuring that allegations against a parent are true. Confrontation through "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 *U.S.* 308, 316, 94 *S.Ct.* 1105, 1110, 39 *L.Ed.2d* 347, 354 (1974). This Court has described it as "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 *U.S.* 149, 158, 90 *S.Ct.* 1930, 1935, 26 *L.Ed.*2d 489, 497 (1970). This Court has also deemed personal confrontation of a witness by the accused to be integral to the truth-finding process. *Coy v. Iowa*, 487 *U.S.* 1012, 1019, 108 *S.Ct.* 2798, 2802, 101 *L.Ed.2d* 857, 864 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"). Indeed, this Court has noted that any restriction in confrontation "calls into question the ultimate integrity of the fact-finding process." *Chambers v. Mississippi*, 410 U.S. 284, 295,

93 S.Ct. 1038, 1046, 35 L. Ed. 2d 297, 309 (1973).

This restriction of the truth-seeking function in child intervention actions is dangerous. Clearly, the legitimacy of a judgment permitting an official intrusion into a family relationship is contingent on the truth of the allegations underlying the agency's intervention complaint. Moreover, an effort to protect a child through a restriction on confrontation will do great damage to all of the parent's children if the complaint is false and the accused parent is precluded from exposing its falseness with effective confrontation, as the children consequently will be denied access to the non-abusive parent while having enhanced access to the parent who may have manipulated the falsehood.

The facts of this case present just such a manipulative situation and highlight the critical need for the traditional jurisprudential truth-seeking mechanisms to be maintained as far as possible in child intervention actions. As these facts indicate, a parent in an acrimonious matrimonial action may have a strong incentive to achieve an unfair advantage by shaping and using a child's allegations to induce a protective agency to seek a restriction of the other parent's access or a cut-off of his rights. As agency caseworkers are not trained criminal investigators, they may forge on with an action even where law enforcement personnel in their better judgment conclude that a complaint is not substantiated. Given the family dynamics, the alleged victim may be strongly biased against the accused. Moreover, the alleged victim may be poised and mature beyond her

years and may not require diminished confrontation to ensure the accuracy of her testimony. A decreased amount of confrontation could embolden her to lie.

A false accusation unchecked through adequate confrontation is devastating to the accused parent and his children even if a judgment of abuse leads to official intervention falling short of a termination of parental rights. Such intervention may include limits on visitation and vacation time which restrict contact between the parent and child. Moreover, as evident in this case, in which petitioner has not had free access to his children for nearly five years, the intervention can effectively end an out-of-state parent's relationship with his children because of the parent's logistical inability to abide by the agency's conditions of visitation. Even for those parents residing in state, an abuse finding is often a critical step toward the termination of rights in "a continuum of proceedings which begins with the filing of a petition for neglect and abuse and culminates in the termination of rights." *Watson v. Div. of Family Servs.*, 813 *A.2d* 1101, 1106 (Del. 2002).

Furthermore, an abuse finding entails an official ruling that the accused is now branded with the onerous label "child abuser" and results in the accused being listed in the state's child abuse registry. In this sense, an abuse judgment is analogous to a criminal conviction. The Pennsylvania Supreme Court has observed that an adverse finding to an accused suffices to register him on a "black list for all time. Moreover, because of the nature of those charged, the existence of a record involving such charges cannot be

underestimated." *A.Y. v. Com., Dept. Of Pub. Welfare, Allegheny County Children and Youth Services*, 537 *Pa.* 116, 124-25, 641 *A.2d* 1148, 1152 (1994).

In the absence of an opinion from this Court which specifically delineates the measure of confrontation which should be accorded an accused in a child agency intervention action, state courts across the country have followed a wide variety of approaches on the issue, most of which effectively discount and do violence to these fundamental interests of the accused and his children. The courts of a number of states have employed this Court's general procedural due process standard in *Mathews v. Eldridge*, 424 *U.S.* 319, 96 *S.Ct.* 893, 47 *L.Ed.2d* 18 (1976), in deciding the issue. As applied to confrontation restrictions in intervention actions, the general standard requires a balancing of (1) the parent's interest that will be affected by the action; (2) the risk to the parent of an erroneous deprivation of rights through the restriction and the probable value to the parent of additional or substitute procedural safeguards; and (3) the government's interests, including the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. *Id.*, 424 *U.S.* at 335, 96 *S.Ct.* at 903, 47 *L.Ed.2d* at 33. Given the natural impulse of courts to protect children who allege abuse and the potential for false allegations in marital disputes, the *Mathews* standard standing alone is too general to safeguard adequately the interests of the accused and his children in maintaining a relationship free from unwarranted official intrusion and preventing unfounded branding and registration of the parent as a child abuser.

This is evident in the casual manner in which a number of states have applied this standard. The courts of these states have simply listed the standard and applied its three prongs in a cursory manner to justify the restriction on confrontation involved. A number of these courts have entered into the analysis with a presumption that a child's interest is always paramount, or a barely concealed assumption that the child has already been abused and traumatized, such that testimony in the accused's presence inevitably would add to the trauma or lead to false testimony denying the alleged abuse. These courts inevitably have sustained the procedure through a conclusory finding that the government interest prong of the standard has more weight.[5]

Some states applying the *Mathews* standard have engaged in a more probing analysis and conferred

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[5] *See, e.g., In re Charles Jason R., Jr.*, 572 *A.2d* 1080, 1081 (Me. 1990) (no due process violation for finding based solely on hearsay; state had overwhelming interest in promoting the welfare of the child); *In re James A.*, 505 *A.2d* 1386, 1390-91 (R.I. 1986) (courtroom cleared of accused and attorney while witness testified; no due process violation under *Mathews* because best interest and welfare of the child outweighs all other considerations), *accord, In re Destiny D.*, 922 *A.2d* 168 (R.I. 2007); *In re Murphy*, 105 *N.C.App.* 651, 414 *S.E.2d* 396 (Ct. App.), *aff'd*, 332 *N.C.* 663, 422 *S.E.2d* 577 (1992) (personal confrontation not constitutionally required because *Mathews* is a flexible standard; children were already cross-examined at the criminal trial, and the agency had an interest in the correct result); *In re Noah W.*, 148 *N.H.* 632, 813 *A.2d* 365 (2002) (in applying *Mathews* standard, hearsay sufficed for judgment because parental rights are subordinate to the State's interest in protecting the child and it was in the best interests of the child that he not testify).

a more extensive right of confrontation. Even these cases tend to fall short of the procedures necessary to safeguard the above-stated fundamental interests of the accused and his children.[6] The cases referring to *Mathews* in which these interests have been safeguarded adequately are exceptional.[7]

A number of states deciding the issue, including New Jersey, do not allude to the *Mathews* standard; these jurisdictions do not provide adequate safeguards to the above-stated interests of the parents and children. Some of these states have acknowledged a parent's due process right to have effective cross-examination of a complaining child witness while dispensing with the need for personal confrontation.

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[6] *See, e.g., In re J.D.C.*, 284 *Kan.* 155, 159 *P.3d* 974 (2007) (due process entitled inmate to some degree of confrontation and cross-examination); *Youth and Families Department v. Maria C.*, 136 *N.M.* 53, 94 *P.2d* 796 (2004) (accused parent must have reasonable opportunity to confront and cross-examine).

[7] *See, e.g., South Carolina Department of Social Services v. Wilson*, 352 *S.C.* 445, 574 *S.E.2d* 730 (2002), in which the South Carolina Supreme Court used the criteria of a statute permitting videotaped testimony of children in criminal cases for guidance in devising a standard for such a procedure in child abuse actions because of the similar important liberty interests at stake; a finding was required that the child would be traumatized by testifying in the presence of the defendant, and the defendant's attorney needed to be able to cross-examine the witness and consult with his client during the testimony. *Id.*, 352 *S.C.* at 455-56, 574 *S.E.2d* at 735. *See also*, In *the Interest of C.W.D*, 232 *Ga.App.* 200, 501 *S.E.2d* 232 (Ct. App. 1998) (children testifying by closed circuit television, with mother having the ability to hear and see the witnesses and consult with her attorney, comported with due process under the *Mathews* standard).

Thus, New York courts have upheld the preclusion of a parent's personal confrontation of a child witness under an abuse of discretion standard if the parent's attorney was present during the child's testimony and could cross-examine the witness. *In re Heather S.*, 19 *A.D..3d* 606, 797 *N.Y.S.2d 136* (N.Y.A.D. 2005). In Massachusetts, the courts have held that "due process requires parents to have the opportunity to effectively rebut adverse allegations concerning child-rearing capabilities. *Adoption of Mary*, 414 *Mass.* 705, 710, 610 *N.E.2d* 898 (1993). However, because a dependant child's needs are "paramount," no violation of due process occurs with the exclusion of a parent from the courtroom if the parent's attorney has the opportunity cross-examine the child "vigorously." *Adoption of Don*, 435 *Mass.* 158, 167-68, 755 *N.E.2d* 721 (2001). *See also, Reynolds v. Ross Cty. Children's Services Agency*, 5 *Ohio St.3d* 27, 448 *N.E.2d* 816, 818 (1983) (no due process violation because counsel was present and cross-examined children).

The courts of a number of other states which do not refer to the *Mathews* standard have completely lost sight that a restriction of confrontation in actions brought by agencies to intrude in the parent-child relationship must accord with principles of due process or have simply given lip service to due process concerns. As has occurred in some of the states which have cited *Mathews,* these courts have permitted judgments of abuse to be based on mere hearsay alone, with the added caveat in most instances that the hearsay be corroborated or that it possess some *indicia*

of reliability.[8] This approach to cases in which liberty interest issues in parenting are at stake starkly contrasts with the inadmissibility of such statements in criminal cases. *Compare Crawford v. Washington,* 541 *U.S.* 36, 53-54, 124 *S.Ct.* 1354, 1365, 158 *L.Ed.2d* 177, 194 (2004) (testimonial hearsay inadmissible under Confrontation Clause in criminal cases).

Thus, the imprecision of the *Mathews* standard and the absence of specific guidance from this Court as to the measure of confrontation which should be accorded accused parents in intervention actions has permitted state courts across the country to reach decisions which do not adequately safeguard the liberty interests of parents and children in preventing unwarranted official intrusion in their relationship and the interest of the parents in preventing unfounded child abuse findings and registration. There is an additional problem resulting from this Court's silence on a standard specifically applicable to these types of cases. As is evident from the varying

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[8] *See, e.g., People in Interest of A.E.*, 914 *P.2d* 534, 538 (Col. 1996) (because proceeding was civil, due process did not confer a right of confrontation); *Cabinet for Health and Family Services, C'wealth of Kentucky v. A.G.G. and W.E.G.*, 190 *S.W.2d* 338, 345-47 (Ky. 2006); *In re April C.*, 131 *Cal.App.4th 599, 31 Cal.Rptr.3d* 804 (Cal. App. 2005) (process designed to protect the child, and paramount concern is child's welfare); *In re E.P.*, 167 *Ill.App3d* 534, 118 *Ill.Dec.* 321, 325-26, 521 *N.E.2d* 603, 607-08 (Ill. App. 1988); *In re Brock*, 442 *Mich.* 101, 106-110, 499 *N.W.2d* 752, 755-59 (1993) (videotaped deposition in which counsel submitted questions to neutral examiner satisfied due process); *Matter of A.S.W.*, 834 *P.2d* 801, 806 (Alaska 1992) (videotaped statement in adjudicative phase satisfied fundamental fairness because of unavailability requirement).

approaches in this country, courts and litigants are confused as to which standard to apply.

The state of the law in New Jersey, as it has been applied to this and similar cases, epitomizes this confusion. New Jersey has enacted a statute which provides for the taking of testimony of juveniles 16 years old and younger *in camera* by closed circuit TV in certain criminal cases and in civil child abuse proceedings. *N.J.Stat.Ann.* 2A:84A-32.4. As a condition for such testimony, (1) the court must make specific findings that "there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court," with those findings specifically relating to the defendant, jurors or spectators; (2) the attorney must be present *in camera* as the witness testifies; and (3) the defendant, if not present, must have a private audio link through which he can communicate with his attorney as the testimony proceeds. App., *infra*, 198a-199a. New Jersey has enacted an almost identically worded provision by which children 16 years old and younger who sue for monetary damages for alleged sexual abuse can provide closed circuit TV testimony against their alleged abuser. *N.J.Stat.Ann.* 2A:61B-1e.[9] Two New Jersey appellate courts dealing with

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[9] The statutes are similar to the Maryland closed circuit TV statute approved by this Court as satisfying the Sixth Amendment's Confrontation Clause in criminal cases. *See Maryland v. Craig*, 497 *U.S.* 836, 110 *S.Ct.* 3157, 111 *L.Ed.2d* 666 (1990) (court must make specific findings that procedure is necessary to protect the welfare of the child, the child will be traumatized by the presence of the defendant instead of the courtroom in general, and the distress will be more than mere

restrictions on confrontation of child witnesses in contexts other than agency intervention actions determined that the criteria of these statutes needed to be satisfied to justify confrontation restrictions under the Due Process Clause. *See, A.B. v. Y.Z.*, 184 *N.J.* 599, 878 *A.2d* 807 (2005) (proof hearing in claim for civil damages resulting from child abuse); *In re Wolf*, 231 *N.J. Super.* 365, 555 *A.2d* 722 (App. Div. 1988) (employment termination action against teacher accused of mistreating students).

Faced with the absence of an opinion from this Court specifically setting forth the measure of confrontation required by due process in agency intervention actions, the two trial courts and three appellate panels which dealt with the issue below produced varying resolutions. The first trial court interviewed Taylor in chambers while petitioner and counsel were provided an audio feed of her testimony. Counsel could not cross-examine Taylor, and there is no evidence that he was afforded the opportunity to suggest questions which the court could use in examining her. The first appellate panel, while recognizing the court's discretion to take Taylor's testimony in chambers, appeared to conclude that substantial compliance with the criteria of *N.J.Stat.Ann.* 2A:84A-32.4 needed to occur if a restriction on confrontation were to comport with due process. The court noted an example where

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nervousness or excitement; defense attorney must be present with the child in chambers and be permitted to cross-examine her; and defendant must have a video and audio feed of the testimony and a private two-way audio link with defense attorney during the testimony).

substantial compliance was not established by the record: counsel was not able to confront Taylor with questions after she testified.

The second appellate panel took a divergent position. It concluded that the court had the discretion to have Taylor testify in open court or to "interview" her in chambers; and that if the court chose the second option, counsel must have the opportunity to be present or observe her by video link, in accordance with the criteria of *N.J.Stat.Ann.* 2A:84A-32.4. Counsel in any event would be permitted to suggest follow-up questions for the court to pose. The implication of the panel's citation of the statute is unclear.

The second trial court attempted to follow the guidance of the second panel, opting to question Taylor and Wanda in the courtroom outside of petitioner's presence and without audio or video feed to petitioner while permitting counsel to be present and to suggest additional questions to pose. The court did not find the statutory requirement of severe emotional trauma to justify the testimony outside petitioner's presence. The third panel concluded that the trial court had wide latitude to permit testimony outside petitioner's presence or to follow the criteria of the statute because the witnesses were juveniles and determined that the court did not abuse its discretion. None of the varying approaches offered as much confrontation as was afforded to the proof hearing defendant in *A.B. v. Y.Z.*, *supra*, or the teacher in *In re Wolf, supra*, even though petitioner was defending far more serious interests.

In light of the foregoing discussion, this Court's review of this matter is urgently needed to establish a specific standard governing the restriction of confrontation of child witnesses in agency intervention actions. This Court's review is essential to preclude the multiple divergent approaches in the various jurisdictions, most of which are insufficient to protect an accused's and child's liberty interest in maintaining a parental relationship free from unwarranted official intrusion and the accused's interest in precluding unwarranted official branding and registration as a child abuser. It is also necessary to provide state courts across the country with guidance regarding the procedures which are required by the Due Process Clause in such actions so that judicial confusion such as was manifested by the New Jersey courts in this matter can be avoided.[10]

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[10] In choosing a standard, the Court could follow the criteria of the statute approved under the Sixth Amendment's Confrontation Clause in criminal cases in *Maryland v. Craig, supra.* The liberty interests and the consequences flowing from false allegations, including the improper infringement upon a fundamental liberty interest and the official branding and registration of an odious status, approximate the interests at stake in a criminal trial, and the various states have had lengthy experience with the standard. Alternately, the Court could apply the criteria set forth in the New Jersey closed circuit TV statutes, augmented by a requirement that counsel be permitted to cross-examine the witness. The Court also could apply the South Carolina Supreme Court's standard in *South Carolina Department of Social Services v. Wilson, supra.*

II. The Examination Procedure Employed with Taylor and Wanda Deprived Petitioner of His Right to Procedural Due Process Under the Due Process Clause

It is evident that petitioner was deprived of a critical measure of confrontation guarantied by the Due Process Clause when Taylor and Wanda testified.

First, there was no demonstrated need for Taylor and Wanda to testify outside of petitioner's presence or to be shielded from cross-examination. As for Taylor, she was 16 and nearing 17 when she testified. The court simply relied upon a letter from Pauline Dessertine in which she noted that Taylor requested that petitioner not be present and voiced concern that cross-examination "might be hostile." Dessertine "concurred" that petitioner's presence "might" be intimidating and requested that questioning be conducted by the court. The letter did not indicate that Taylor would suffer any mental distress other than the normal anxiety facing any witness called upon to testify in the presence of a person whom she had accused of committing a serious offense against her and facing cross-examination by that person's attorney.

Furthermore, the evidence before the court did not indicate that Taylor would suffer inordinate

distress by testifying in petitioner's presence and being subject to cross-examination. At the time of Taylor's testimony, she had not resided with petitioner for 3½ years and had no contact with him. Petitioner was not Taylor's parent. The incident Taylor would relate occurred 6½ years earlier and involved an isolated act of non-penetrative contact. Although the third appellate panel noted that Taylor had cried when she revealed her complaint, the revelation and bout of crying occurred more than three years earlier.

Already three years before the trial, Taylor had informed Dessertine that she was doing well in her life and did not need counseling, and there is no evidence that she received or needed therapeutic treatment thereafter. When Dessertine evaluated Taylor shortly before her testimony, she observed that Taylor was "a rather mature and stable adolescent" who was notably more secure and mature than she had been three years earlier. Taylor informed Dessertine that she was ready to testify in the court, and Dessertine agreed. App. *infra*, at 65a-67a, 72a-75a, 194a.

Regarding Wanda, there was absolutely no basis in the record for a need to shield her from personal confrontation with petitioner and question-by-question cross-examination by petitioner's counsel. The trial court did not allude to any possible emotional distress on her part in testifying. Wanda was nearly 17½, old enough for service in the United States military with parental consent. Wanda did not have a parental relationship with petitioner, had no contact with him and was relating an alleged indecent exposure which occurred years earlier.

Furthermore, alternatives existed to the complete lack of confrontation which the court ordered. The court was always free to restrict the scope of counsel's cross-examination or to preclude harassing questions. Moreover, although the court indicated that it did not have a closed-circuit television system available, there was no reason presented why the matter could not have been continued until the court obtained such a system. Certainly, the closed circuit procedure was not esoteric. The New Jersey statute has existed for years, and the technology could have been obtained with a reasonable continuance and a modicum of effort. App. *infra*, 199a.

In contrast to the lack of need for the restrictions on confrontation which the court ordered, petitioner had essential interests at stake in parenting M.D. and K.D. and being free from official branding and registration as a child abuser. Taylor's and Wanda's testimony put these interests at grave risk, and defendant had a reasonable expectation to observe them as they jeopardized those interests. Moreover, his inability to personally confront Taylor and Wanda as they testified, or even to see or hear their testimony, deprived him of a time-honored deterrent against false testimony, as they could say what they wished knowing defendant could not see or hear them. It also deprived him of the ability to assess their words and credibility and thereby assist his attorney in formulating cross-examination questions. This complete deprivation of personal confrontation alone violated petitioner's right to due process.

Petitioner also was denied due process by the

court's preclusion of counsel from cross-examining the witnesses on a question-by-question basis. Adversarial question-by-question cross-examination is integral to due process in a child agency intervention action when the outcome of a case hinges upon the credibility of witnesses. While courts possess "wide latitude" even in criminal cases "to impose reasonable limits on ... cross-examination," *Delaware v. VanArsdall*, 475 *U.S.* 673, 679, 106 *S.Ct.* 1431, 1435, 89 *L.Ed.*2d 674, 683 (1986), a court must have compelling reasons in an action threatening an accused's liberty interest in parenting to completely preclude his counsel's adversarial testing of a witness's responses on a question-by-question basis and to opt instead to conduct all the questioning. Such a preclusion of adversarial testing of a witness's responses is contrary to our adversarial system, which relies on cross-examination of witnesses by opposing counsel as the "greatest legal engine ever invented for the discovery of truth." *California v. Green, supra,* 399 *U.S.* at 158, 90 *S.Ct.* at 1935, 26 *L.Ed.*2d at 497. As the New Jersey Supreme Court has observed, "[p]roceedings in which the judge acts as the sole inquisitor are, with rare exception, foreign to our adversarial system." *State v. Byrd*, 198 *N.J.* 319, 355, 967 *A.2d* 285, 306 (2009), *citing, United States v. Thompson,* 827 *F.*2d 1254, 1258 (9th Cir. 1987).

There is good reason for precluding a court from conducting all of the questioning of a key witness when important rights of the witness's opponent are at stake. A court by its position simply does not have the same capacity as cross-examining counsel to effectively ferret out the truth. The court's neutral position

during questioning can embolden a fabricating witness to retain the core of her false account to a greater extent than would be the case if the questioner were antagonistic to the account. Moreover, a court lacks the single-minded focus of a partisan counsel to draw out all of the inconsistencies in a witness's testimony as it unfolds. To the contrary, a court has multiple concerns during questioning which can detract from a narrowly focused effort to poke holes in a witness's account. These concerns range from a focus on responses from the vantage point as fact-finder instead of adversary, a need to elicit facts which the witness's proponent requires to support its case, a focus on scheduling and the orderly administration of the proceeding at the expense of posing follow-up questions which might reveal inconsistencies, and the desire as the official responsible for the proceedings to make the courtroom setting as comfortable as possible to a juvenile witness.[11]

Furthermore, the efficacy of cross-examination depends on the questioner's ability to assess the responses of a witness one-by-one and to attack those responses with a strategy and rhythm of his own. It also depends upon a neutral fact-finder's undivided attention to the colloquy between the witness and the cross-examiner. A party in the United States has a

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[11] The working of this last conflicting concern is especially apparent in this case, as the trial judge did everything in her power to put Taylor and Wanda at ease, placing them with her at counsels' table, prefacing some questions about sexual details with precatory words of understanding how hard it was to answer, and thanking them for their testimony. App., *infra*, 95a-126a, 140a-155a.

reasonable expectation that the highly sensitive task of cross-examination be conducted by an advocate of his choice, especially when the entire case turns on the credibility of the witness and fundamental parenting interests are at stake, and that the witness's credibility be assessed by a judge who is not distracted by conflicting interests as the testimony unfolds.

Finally, courts in the United States simply do not have the experience or training necessary to conduct the European-style inquisitorial hearing which the trial court conducted in this case. As the Ninth Circuit in *United States v. Thompson, supra,* recognized:

> Our system is grounded on the notion that truth will most likely be served if the decisionmaker ... has the benefit of forceful argument by both sides. *Herring v. New York,* 422 *U.S.* 853, 862, 95 *S.Ct.* 2550, 2555, 45 *L.Ed.2d* 593 (1975). Inquisitorial proceedings, where the judge takes an active role in ferreting out the truth, may be the rule elsewhere in the world, but they are decidedly alien to our way of thinking. Our judges usually have neither the time, nor the means, nor the training to investigate facts pertaining to the cases before them. Even on matters of law, our judges must rely heavily on counsel to come up with the arguments and citations supporting their respective positions. [*Ibid.*]

Petitioner asserts that the inquisitorial system procedure which the court employed critically undermined his ability to compel truthful testimony from Taylor and Wanda. Petitioner had ample basis to cross-examine these witnesses. Regarding Taylor, it is not at all certain what Taylor saw and reported. The incident which Taylor related to Cichielo related was fleeting, involved bizarre, unsubstantiated complaints of a terrible smell and was not consistent with sexual arousal. Taylor's exact fresh complaint to Cichielo, who acknowledged she was relating "words to the effect" of what Taylor actually reported, came from Cichielo following the couple's divorce. Taylor was awoken immediately before the alleged incident and admitted she might have dreamed it.

Taylor proceeded to provide multiple conflicting assertions about the number of incidents, the lighting conditions whether petitioner's penis was erect and whether she feigned sleep or squinted and looked away. Taylor admitted to Dessertine that she disliked petitioner, and her complaint appeared to have been timed to coincide with the conclusion of the divorce proceedings between petitioner and Cichielo. Thus, it was entirely possible that Taylor initially dreamed or misconstrued the incident and that Cichielo developed her testimony to use as a weapon in her matrimonial dispute. Effective cross-examination could have exposed her biases and the numerous conflicting assertions.

Regarding Wanda, she had signed a damaging statement which appeared to have been formulated by an adult in response to pressure posed by Cichielo and

Taylor. She then simply repeated the allegations in the statement. Petitioner could have cross-examined her on the pressure placed upon her and whether she truly authored the statement.

The procedure which the court employed precluded effective probing questioning in those areas. This is especially apparent with the court's treatment of the questions proposed by petitioner's counsel after each witness testified. The court did not sufficiently focus its questions, did not follow up on Taylor's responses and never confronted her with her conflicting statements. Moreover, the court, with one exception, did not ask Wanda the questions suggested by counsel.

Clearly, petitioner's deprivation of personal confrontation and confrontation by cross-examination deprived him of his right of an opportunity to compel truthful testimony from Taylor and Wanda. Thus, the restriction on confrontation substantially prejudiced him and deprived him of his rights under the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

December 30, 2009

APPENDIX

SUPREME COURT OF NEW JERSEY
C—158 September Term 2009
64,434

NEW JERSEY DIVISION OF
YOUTH AND FAMILY SERVICES,

Plaintiff—Respondent,

v.

ON PETITION FOR
CERTIFICATION

D.D.,

Defendant—Petitioner.

FILED OCT 09
S/ MARK NEARY
CLERK

IN THE MATTER OF THE
GUARDIANSHIP OF T.S., K.D.
and M.D., MINORS

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4642-07 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 6th day of October, 2009.

S/ Mark Neary
CLERK OF THE SUPREME COURT
OF NEW JERSEY

The foregoing is a true copy
of the original on file in my office.
S/ Mark Neary, Clerk of the Supreme Court

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4642-07T4

NEW JERSEY DIVISION OF
YOUTH AND FAMILY SERVICES,
Plaintiff-Respondent/
Cross-Appellant,

v.

D.D.,
Defendant-Appellant/
Cross-Respondent.

IN THE MATTER OF
T.S., K.D. and M.D.,
Minors.

Submitted May 6, 2009 - Decided June 1, 2009

Before Judges Parrillo and Lihotz.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hunterdon County, Docket No. FN-10-26-05.

Wronko & Loewen attorneys for appellant/cross-respondent (Gilbert G. Miller, of

counsel and on the brief).

Anne Milgram, Attorney General, attorney for respondent/cross-appellant, New Jersey Division of Youth and Family Services (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Peter Alvino, Senior Deputy Attorney General, on the brief).

Yvonne Smith Segars, Public Defender, Law Guardian, attorney for minors T.S., K.D. and M.D. (Noel C. Devlin, Assistant Deputy Public Defender, on the brief).

PER CURIAM.

This matter returns for review following our remand. Defendant D .D. appeals from a Family Part order entered on April 17, 2008, entered after a fact-finding hearing. The trial judge determined D.D. "committed a sexual abuse act upon" his step-daughter, T.S., and "pose[d] a risk of sexual harm" to his natural daughters, M.D. and K.D. As a result, the court ordered D.D. to have no contact with T.S. and continued the previously ordered custody and visitation provisions that required the children to remain with R.C., D.D.'s former wife and the children's mother. Plaintiff, the New Jersey Division of Youth and Family Services (DYFS or the Division), was ordered to provide care and supervision of the children and to supervise D.D.'s visitation with his two daughters.

D.D. specifically argues:

POINT I

D.D. WAS DENIED HIS DUE PROCESS RIGHT TO CONFRONT T.S. AND W.K. AT TRIAL.

POINT II

DYFS FAILED TO ESTABLISH THAT D.D. PLACED M.D. AND K.D. AT RISK OF HARM WHICH RENDERED EACH AN "ABUSED AND NEGLECTED CHILD" AS THAT TERM IS DEFINED IN *N.J.S.A.* 9:6-8.21(C).

POINT III

EVIDENCE THAT D.D. DOWNLOADED PORNOGRAPHY ON HIS WORK COMPUTER WAS INADMISSIBLE; THE COURT ERRED IN CONSIDERING IT FOR SOME USES.

POINT IV

THE COURT ERRONEOUSLY ADMITTED EVIDENCE THAT D.D. EXPOSED HIMSELF TO W.K.

POINT V

THE TRIAL COURT'S FINDING THAT T.S. WAS ABUSED WAS UNSUPPORTED BY COMPETENT, SUBSTANTIAL AND CREDIBLE EVIDENCE.

POINT VI

THE TRIAL COURT DID NOT

ADDRESS[ ] D.D.'S POLYGRAPH CONTENTIONS PROPERLY.

POINT VII

THE MATTER MUST BE REMANDED TO A JUDGE IN A DIFFERENT COUNTY.

DYFS filed a cross-appeal challenging evidential rulings made by the trial court. The Division contends the trial court mistakenly ruled its evidence of D.D.'s actions to obtain and actually possess sexually explicit photographs of children was irrelevant to the issue of whether D.D. had improper sexual contact with his stepdaughter. DYFS also challenges the trial court's ruling regarding D.D.'s exposure of his genital area to the underage neighbor, W.K., arguing that act alone constitutes child abuse.

We have considered the arguments raised on appeal challenging the order entered. Based upon the record and applicable legal standards, we affirm.

I.

D.D. and R.C. were married in 1998 and have two daughters, K.D. and M.D, born October 1, 2000 and December 7, 2001. Also living with the couple was T.S., R.C.'s daughter born on August 5, 1991, during a prior marital relationship. On January 20, 2005, D.D. and R.C. were divorced in Minnesota where they then resided. The Marital Termination Agreement incorporated into the divorce judgment granted R.C. and D.D. equal parenting time in six-month intervals with M.D. and K.D., and allowed R.C. and the children to return to New Jersey. R.C. moved back to New Jersey in December 2004.

On January 20, 2005, DYFS received a referral from therapist Pauline Dessertine, R.N., M.S.N., Ed. S., of Kurtis Counseling Center. Dessertine informed the Division her client, T.S., disclosed she had experienced sexual abuse by her stepfather, D.D. The incident occurred on August 23, 2001, when T.S. was age ten. Succinctly, the child stated she fell asleep in a sleeping bag in the basement and was awakened by D.D., who rubbed his penis on her face while an adult movie played on the television. The child immediately reported the incident to her mother. R.C. confronted D.D., who asked, "What did she say?" He then denied the incident. R.C. found no "evidence" of the encounter described by T.S. After she and D.D. spoke to T.S., she accepted D.D.'s assurances that nothing happened.[1] At that time, R.C. did not report the incident or take T.S. for treatment.

In February 2004, Dessertine was providing marital therapy to R.C. and D.D. Part of the discord resulted from the fact that D.D. was terminated from his position as a project manager for Roche Molecular Diagnostics because he downloaded twenty-two gigabytes of pornographic material contained in over 474,000 files, which he stored on his work computer despite prior warnings not to do so. In March 2004, T.S. began counseling with Dessertine in preparation

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[1] Dessertine also told the Division that T.S. recounted an incident between D.D. and T.S.'s best friend and next door neighbor, W.K. In W.K.'s later obtained statement, she stated D.D. came down to the basement wrapped in a towel, obtained W.K.'s attention, and then removed the towel. She stated D.D. asked her to keep the incident a secret.

for the family's move to Minnesota, where D.D. had secured new employment. After the move, Dessertine continued the marital therapy, as well as T.S.'s counseling sessions telephonically. Despite the counseling efforts, the parties' marriage deteriorated and D.D. filed for divorce in Minnesota in October 2004. In November 2004, T.S., who was unhappy living in Minnesota, returned to New Jersey to live with her father. When R.C. and the younger children returned to New Jersey, she and T.S. resumed face-to-face counseling sessions with Dessertine. It was during a January 18, 2005 session that T.S. made her disclosure about the sexual abuse.

On February 15, 2005, DYFS filed a complaint and order to show cause against D.D. and R.C. pursuant to *N.J.S.A.* 9:6-8.21, *N.J.S.A.* 30:4C-12, and *Rule* 5:12-1.[2] After trial, the court entered its finding that D.D. committed an act of abuse and neglect by engaging in "inappropriate sexual contact on August 23, 2001." The dispositional order entered that same date restrained D.D. from all contact with T.S., placed the minor children, M.D. and K.D., in R.C.'s custody and limited D.D.'s contact with his daughters to supervised visitation. At the time the order was entered, D.D. continued to reside in Minnesota.

D.D. appealed the provisions of the order that affected his parenting time with his daughters. We

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[2] The Hunterdon County Prosecutor's Office jointly investigated the allegations of D.D.'s interactions with T.S. and W.K. On January 25, T.S. was interviewed. W.K. declined to be interviewed. The Prosecutor declined to initiate formal proceedings against D.D.

reversed the order after reviewing D.D.'s jurisdictional challenge. *New Jersey Div. of Youth and Family Servs. v. D.D. (D.D.I)*, No. A-1165-05T4 (App. Div. July 14, 2006) (slip op. at 33-34). In our opinion, we discussed certain challenges raised by D.D., including: it was improper to limit T.S.'s testimony to an in camera interview in the presence of the judge and guardian ad litem even though counsel for the parties listened simultaneously; the trial judge erred in admitting evidence of pornographic downloads made by D.D. onto his work computer; and the court should have admitted D.D.'s polygraph results. It aids our understanding of D.D.'s current challenges to briefly state our prior determination of these issues.

We reversed the trial court's September 23, 2005 orders because Minnesota, not New Jersey, had subject matter jurisdiction over custody and visitation issues. *D.D. I, supra,* (slip op. at 33-34). Regarding the due process challenges attacking the in camera interview of T.S., we noted that so long as D.D.'s counsel was permitted to submit questions to be asked of the child while he listened to the interview as it progressed, it "constituted the functional equivalent of [D.D.] being present for [due process] purposes[.]" *D.D. I, supra,* (slip op. at 39). Also, we found harmless the court's failure to make the four-prong analysis required by *State v. Cofield,* 127 *N.J.* 328, 338, 605 *A.2d* 230 (1992), prior to admitting evidence of defendant's act of downloading pornography on his work computer. *D.D. I, supra,* (slip op. at 39-40). Finally, we found no error in denying the admission of defendant's proposed polygraph evidence. *Id.* at 40.

In an Emergency Temporary Order, the District Court for the First Judicial District, Carver County,

Minnesota (Minnesota court) applied the provisions of the September 2005 New Jersey orders, including that M.D. and K.D. remain in R.C.'s custody pending its further decision, and that D.D.'s visitations be supervised until its full review. Following a hearing, the Minnesota court relinquished jurisdiction to New Jersey to determine child custody and parenting time issues, but retained jurisdiction over the remaining issues raised in the post-judgment divorce motions. The children remained in R.C.'s custody, and D.D. was granted supervised visitation.

On January 17, 2007, DYFS filed an amended verified complaint based upon newly discovered evidence that the downloads on D.D.'s work computer included child pornography. The then assigned trial judge heard arguments advanced by the parties on the effect of our prior opinion. D.D. argued our reversal rendered the September 2005 orders a nullity, entitling him to a new fact-finding hearing on all issues. DYFS and the children's respective law guardians opposed any need for re-presentation of T.S.'s testimony and maintained the court should conduct only a limited evidentiary hearing to amplify and update the record. The then assigned Family Part judge rejected D.D.'s arguments and held a compliance review hearing. The September 2005 restraints on D.D.'s contact with M.D. and K.D. were continued. D.D. again sought appellate relief.

We again reversed, explaining the effect of the prior reversal was that no vestige of the September 2005 orders remained in effect and a de novo fact-finding hearing was necessary. *New Jersey Div. of Youth and Family Servs. v. D.D. (D.D.II)*, No. A-3745-06T2 (App. Div. Jan.17, 2008) (slip op. at 6-7). We

required T.S.'s testimony

> to be taken in open court or, if the judge elects in his [or her] discretion to have her re-interviewed in chambers, *see R.* 5:12-4(b), all counsel shall have the rights to either be present or to observe the child's responses contemporaneously through closed circuit television or a comparable video link, in accordance with *N.J.S.A.* 2A:84A-32.4. Consistent with our prior opinion, all counsel shall be afforded the opportunity to submit to the court additional questions to pose to T.S. after the initial portions of such an interview.
>
> ....
>
> A renewed inquiry of T.S. on such potential improper communication [by R.C. in violation of the court's sequestration order] shall be permitted. If such a violation is found by the court, it may fashion an appropriate remedy, which may include an evidential discounting of T.S.'s credibility. [*D.D. II, supra,* (slip op. at 7-8).]

As a precautionary measure, we interposed short-term interim restraints on D.D.'s contact with his children and ordered an expedited hearing. *D.D. II, supra,* (slip op. at 9).

On March 11, 2008, the fact-finding hearing on remand began before a third Family Part judge then assigned to the matter. The trial continued over five additional days. T.S., then age sixteen, testified in the courtroom as the trial judge and she sat at counsel

table. Neither D.D. nor R.C. were present. However, D.D.'s attorney, the Deputy Attorney General on behalf of the Division, and the Law Guardians for T.S. and M.D. and K.D. were seated in the gallery. When all questions were posed on "direct" the court recessed, allowed counsel to consult with their respective clients and to submit follow-up questions, which were then asked of T.S.

During the fact-finding hearing, the Division presented testimony from Matthew Hengst, a DYFS caseworker; Officer Matthew Dunn, special agent for the United Stated Department of Homeland Security, Child Exploitation Section, who provided information on the nature and content of "Lolita's Kingdom" and reviewed the files downloaded by D.D.; R.C.; Dessertine; J.K., who identified a written statement prepared by her daughter W.K., an alleged child victim of D.D.'s inappropriate sexual behavior; Richard Vallacchi, Roche's network administrator, who, analyzed the files on D.D.'s work computer and, although unable to open them, matched 827 files that had a comparable size and name to files on a website under the domain name "lolitaskingdom"; Dr. Phillip Witt, a clinical psychologist who specialized in sex offenders and was consulted by D.D. when he was ordered to obtain an evaluation; and, W.K., age seventeen, who testified on rebuttal in a manner similar to T.S. D.D. testified on his own behalf.

The court concluded DYFS had proven by a preponderance of the evidence that D.D. committed an act of sexual abuse upon T.S. and posed a risk of sexual harm to M.D. and K.D. The trial judge credited T.S. and found D.D.'s testimony incredible. The court determined D.D.'s act of downloading pornography was

not relevant to determine whether he engaged in acts of abuse toward T.S. Also, the court found the probative value of W.K.'s testimony was not outweighed by any prejudice, and the evidence was "very material" to "whether the defendant had a sexual appetite that was likely to be aroused or gratified by being near a girl of the age of around ten." The order entered continued the September 23, 2005 custody provisions for M.D. and K.D., imposed supervised contact between D.D. and his daughters, and ordered him to engage in counseling. This appeal and cross-appeal ensued.

II.

Our review of a trial court's factual findings is limited. "The general rule is that findings by the trial court are binding on appeal when supported by adequate, credible evidence." *Cesare v. Cesare,* 154 *N.J.* 394, 412, 713 *A.2d* 390 (1998) (citing, *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 *N.J.* 474, 484, 323 *A.2d* 495 (1974)). Since a trial court " 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." *Cesare, supra,* 154 *N.J.* at 412, 713 *A.2d* 390 (quoting *Pascale v. Pascale,* 113 *N.J.* 20, 33, 549 *A.2d* 782 (1988)). In this regard, a Family Part judge "has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand" and "has a 'feel of the case' that can never be realized by a review of the cold record." *New Jersey Div. of Youth & Family Servs. v. E.P.,* 196 *N.J.* 88, 104, 952 *A.2d* 436 (2008) (quoting *New Jersey Div. of Youth and Family Servs. v. G.L.,* 191 *N.J.* 596, 605,

926 *A.2d* 320 (2007)). Consequently, we do "not disturb the 'factual findings and legal conclusions of the trial judge unless ... convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" *Cesare, supra,* 154 *N.J.* at 412, 713 *A.2d* 390 (quoting *Rova Farms, supra,* 65 *N.J.* at 484, 323 *A.2d* 495). However, we are not bound by "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty v. Manalapan Tp. Comm.,* 140 *N.J.* 366, 378, 658 *A.2d* 1230 (1995).

A finding of abuse or neglect must be based on a preponderance of the competent, material, and relevant evidence *N.J.S.A.* 9:6-8.46(b). Under the preponderance standard, the "evidence must demonstrate that the offered hypothesis is a rational inference, that it permits the trier[ ] of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." *In re Estate of Reininger,* 388 *N.J.Super.* 289, 298, 907 *A.2d* 1024 (Ch. Div. 2006) (citing *Joseph v. Passaic Hosp. Ass'n,* 26 *N.J.* 557, 574-75, 141 *A.2d* 18 (1958)). Recognizing the special expertise of judges hearing matters in the Family Part, we note if the trial judge's conclusion is evidentially supported, we accept it. *Cesare, supra,* 154 *N.J.* at 412, 713 *A.2d* 390. We reverse "[o]nly when the family court's conclusions are so 'clearly mistaken' or 'wide of the mark'" to "ensure that there is not a denial of justice." *E.P., supra,* 196 *N.J.* at 104, 952 *A.2d* 436 (quoting *G.L., supra,* 191 *N.J.* at 605, 926 *A.2d* 320).

III.

A.

As he did in the first appeal, D.D. raises a constitutional challenge to the methodology utilized to elicit T.S.'s testimony. Prior to trial, the question of how to present T.S.'s testimony arose. After considering T.S.'s age and Dessertine's recommendation that she not testify in open court, the trial judge determined T.S. would not be called as a routine trial witness and stated

> I'm going to issue the following restrictions on her testimony.... First of all, because I don't have a video link to chambers, that would have been my first choice, but I don't have it, so I'm going to question her myself. I'm going to question her in the setting of this courtroom. I think I will probably do it sitting at counsel table and allow counsel to have submitted questions for direct examination ahead of time. Allow counsel to remain in the courtroom in the gallery area, listen to the answers and then submit questions for cross examination after they've heard the direct statements made by [T.S.] in response to my questions.
>
> I think the only evenhanded thing to do is to ban all parties from the courtroom and anybody else, ... except of course, courtroom personnel. I have my sheriff's officer and I will have my court clerk present.
>
> That will as effectively as I can do, simulate an interview in chambers with

> counsel watching it via video feed. I think it will enhance [T.S.'s] comfort level, if that's possible, by sitting at counsel table with her rather than being on the bench and putting her on a witness stand.
>
> And I think that ordering [D.D.] to be absent from the proceeding is too prejudicial to his side of the case, if I allow [R .C.] to remain in the courtroom and have the advantage of hearing it and suggesting questions to her counsel. That seems to be inherently unevenly treated. So I will have no parties in the courtroom while this is going on or anybody else except counsel and my staff.

D.D. argues the procedure followed was "highly irregular" and he adds the evidence elicited by W.K., who was interviewed in the same manner, must also be excluded.

The right of an accused to be confronted with the witnesses against him is protected by the Sixth and Fourteenth Amendments of the United States Constitution and by Article I, paragraph 10 of the New Jersey Constitution. *State v. Washington*, 202 *N.J. Super.* 187, 191, 494 *A.2d* 335 (App. Div.), *certif. denied,* 102 *N.J.* 308 (1985). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 *U.S.* 836, 845, 110 *S.Ct.* 3157, 3163, 111 *L.Ed.*2d 666, 678 (1990).

"Although the constitutional right to

confrontation is firmly entrenched in American jurisprudence, the right is not absolute." *State v. Smith,* 158 *N.J.* 376, 384, 730 *A.*2d 311 (1999) (quoting *Craig, supra,* 497 *U.S.* at 844, 110 *S.Ct.* at 3163, 111 *L.Ed.*2d at 677). For example, the constitutional safeguards afforded to criminal defendants do not attach in the same way to civil litigants. *A.B. v. Y.Z.,* 184 *N.J.* 599, 604, 878 *A.*2d 807 (2005). Specific to this matter, we note State statutes and Court Rules limit confrontation when the witness is a child, particularly a child victim of sexual abuse. *New Jersey Div. of Youth & Family Servs. v. J.B.,* 120 *N.J.* 112, 126, 576 *A.*2d 261 (1990). The protection of children from undue trauma associated with testifying is an important public policy goal. *Smith,* 158 *N.J.* 376, 386, 730 *A.*2d 311 (1999). Thus, in Title 9 matters, the measure of confrontation of a child victim appearing as a witness may be circumscribed by *Rule* 5:12-4(b) or *N.J.S.A.* 2A:84A-32.4.

"Trial judges have broad discretion in abuse and neglect cases, as well as custody and visitation matters untainted by an allegation of abuse or neglect, to conduct a private examination of a child." *New Jersey Div. of Youth and Family Servs. v. L.A.,* 357 *N.J. Super.* 155, 168, 814 *A.2d* 656 (App. Div. 2003) (citing *New Jersey Div. of Youth & Family Servs. v. S.S.,* 185 *N.J. Super.* 3, 7, 447 *A.2d* 183 (App. Div.), *certif. denied,* 91 *N.J.* 572, 453 *A.2d* 883 (1982)). Under *Rule* 5:12-4(b), a Family Part judge has discretion in a "child's best interests" to enter orders allowing a child's testimony to be "taken privately or in chambers or under such protective orders as the court may provide." *Ibid.* The purpose of a private interview with the child is to afford the trier of fact the

opportunity to assess the child's credibility, his or her powers of communication and observation, and his or her demeanor. *Ibid.*

The court's authority over the manner in which trials are conducted is reinforced by the Rules of Evidence.

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. [*N.J.R.E.* 611(a)].

Further support for the proposition that the right to in-court, face-to-face confrontation is not absolute is found in *N.J.S.A.* 2A:84A-32.4, which sets forth an alternative means of securing a child-victim's testimony out of the normal courtroom setting. The statute states, in pertinent part:

> a. [I]n any action alleging an abused or neglected child ..., the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a witness on closed circuit television at the trial, out of the view of the ... defendant, or spectators upon making findings as provided in subsection b. of this section.
>
> b. An order under this section may be made only if the Court finds that the witness is 16 years of age or younger and

> that there is a substantial likelihood that the witness would suffer severe emotional distress if required to testify in open court.
>
> ....
>
> d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system. [*N.J.S.A.* 2A:84A-32.4].

The use of the authorized statutory procedure "does not violate an accused's right of confrontation under either the United States or New Jersey Constitutions." *State in Interest of B.F.*, 230 *N.J. Super.* 153, 158, 553 *A.*2d 40 (App. Div. 1989); *Smith, supra,* 158 *N.J.* at 386, 730 *A.*2d 311; *State v. Bass,* 221 *N.J. Super.* 466, 476-77, 535 *A.*2d 1 (App. Div. 1987), *certif. denied,* 110 *N.J.* 186, 540 *A.*2d 182 (1988); *State v. McCutcheon,* 234 *N.J. Super.* 434, 439, 560 *A.*2d 1303 (Law Div. 1988).

Thus, when taken together, the provisions of the statute and court rules reflect the State's interest in encouraging witnesses and victims of child abuse to testify, *J.B., supra,* 120 *N.J.* at 126, 576 *A.*2d 261, and grant to a trial judge the discretion to fashion protections in the best interest of the child when the testimony of a child-victim is necessary for the prosecution of the Division's complaint for abuse and neglect.

D.D. suggests the trial judge failed to follow the dictates of the statute in two regards. First, T.S. was almost seventeen and W.K. was over seventeen.

Second, the record is void of any proof of "a substantial likelihood that the witness would suffer severe emotional distress if required to testify in open court." *N.J.S.A.* 2A:84A-32.4. D.D.'s theory is R.C. used the event as a weapon in the parties' matrimonial dispute. He maintains crafted cross-examination directly confronting T.S. would have probed the rampant inconsistencies in T.S.'s versions of the events on August 23, 2001, and uncovered the truth that T.S. dreamt the incident.

We suggest more detailed findings should have been made by the trial judge, and we agree *N.J.S.A.* 2A:84A-32.4 is inapplicable when assessing the manner to present W.K.'s testimony, *A.B., supra,* 184 *N.J.* at 604, 878 *A.*2d 807. We find the procedures employed were within the discretion of the trial court and any errors were not "clearly capable of producing an unjust result." *R.* 2:10-2.

The first step in assessing a child's ability to understand the process of truth-telling and to testify must involve a determination of his or her emotional state. In the exercise of discretion on this issue, the trial judge is encouraged to conduct "a face-to-face interview with the child." *State v. Crandall,* 120 *N.J.* 649, 663, 577 *A.*2d 483 (1990). Here, the trial judge did not specifically speak to T.S. to assess her ability to testify, but rather considered Dessertine's recommendation as to the child's emotional strength, T.S.'s maturity, based on her then age, and her past ability to participate in an in camera interview and review by the prosecutor's office. Here, it cannot be disputed that T.S., who was still sixteen, was capable of understanding the oath and providing testimony as a witness in this matter.

The second finding must be whether the child's testimony should be presented in the routine of a trial, face-to-face with the alleged abuser, or in some other manner. When T.S. related the facts surrounding the abuse to Dessertine, even though the incident had occurred four years earlier, she was weeping. As a result, Dessertine counseled against the child testifying in D.D.'s presence and advised the court to avoid subjecting her to perceived hostile cross-examination. The trial judge reviewed Dessertine's recommendation and inferred T.S. "expressed concerns about testifying in a full courtroom." The trial judge additionally considered the nature of the Division's complaint, which involved sexual abuse. With an eye toward the need to protect minor victims of sex crimes from further trauma and embarrassment experienced in a trial proceeding, the court concluded T.S. should not testify in the course of the trial. The findings made, although sparse, were adequate to invoke the court's reasoned discretion and "inherent power to protect the witness[ ] from further damage by providing an alternate means of testifying." *A.B., supra,* 184 *N.J.* at 608, 878 A.2d 807 (J. Rivera-Soto, concurring).

The court did not have a closed circuit television system, making exact compliance with *N.J.S.A.* 2A:84A-32.4 impossible. Nevertheless, guided by the statute and in accordance with *Rule* 5:12-4(b), the trial judge faced with limited court resources devised a procedure designed to balance the needs of the child-witness and afford D.D. all process he was due. While deficient technology precluded D.D. and R.C. from a simultaneous review of T.S.'s testimony, their interests were adequately protected and represented by counsel.

Further, the court stopped the examination to allow attorney and client to confer and generate additional necessary questions to be posed to the child witnesses.

The examination of T.S. was detailed and probing. We have no doubt it successfully ensured the reliability of the evidence in the context of an adversary proceeding while tempering the courtroom process to safeguard T.S. from further emotional trauma. D.D. offers nothing to suggest the truth was not served by employing this process. His argument suggesting T.S. was a pawn of her mother to advance R.C.'s interests in the divorce is flawed because T.S. related the events to R.C. and D.D. long before marital strife set into their relationship. Further, there was nothing in T.S.'s prior life experience to suggest she would have such sexualized knowledge or lewd thoughts about her stepfather at ten years of age. Moreover, the theory that T.S. had a dream was initiated and advanced by D.D.

The trial judge made detailed findings regarding T.S.'s credibility, finding her to be "forthright in demeanor" and noting, she "gave direct answers" and had "good constant eye contact." D.D.'s testimony was found to be "frankly incredible." The trial judge's opinion details the basis for these findings, which provides more than ample support. Under all the facts and circumstances presented, we will not interfere with the trial judge's exercised discretion.

Regarding W.K.'s testimony, we agree with D.D. that she was seventeen and thus, over the maximum age to allow application of the statute. *A.B., supra,* 184 *N.J.* at 608, 878 *A.*2d 807. Nevertheless, we reject D.D.'s urging for reversal. On behalf of D.D., counsel suggested the court follow the same procedures

employed for T.S. We conclude the error in attempting to invoke the statute was not plain error, as it was not "clearly capable of producing an unjust result ." *R.* 2:10-2.

B.

D.D. next argues the evidence does not support the trial court's finding that M.D. and K.D. were abused and neglected, as defined by *N.J.S.A.* 9:6-8.21(c). D.D. maintains (1) no evidence showed D.D. inappropriately touched M.D. or K.D.; (2) at the time of the alleged incident with T.S., M.D. was less than one year old and K.D. was not yet born; and (3) when DYFS acted, the alleged incident with T.S. had occurred over four years earlier, supporting D.D.'s position he posed no imminent danger of a substantial risk of harm to his children. We disagree.

We start with the relevant statutes. *N.J.S.A.* 9:6-8.46(a) provides:

> (1) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the responsibility of, the parent or guardian[.]

"'Predictions as to probable future conduct can only be based upon past performance.... We cannot conceive that the Legislature intended to guarantee parents at least one chance to ... abuse each child.'" *DYFS v. Robert M.*, 347 *N.J. Super.* 44, 68, 788 *A.*2d 888 (App. Div.) (quoting *J. & E. v. M. & F.*, 157 *N.J. Super.* 478, 493, 385 *A.*2d 240 (App. Div.), *certif. denied,* 77 *N.J.* 490, 391 *A.*2d 504 (1978)), *certif. denied,* 174 *N.J.* 39 (2002). Thus, a "court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect' " to make

a finding of abuse. *DFYS v. S.S.*, 372 *N.J.Super.* 13, 24, 855 *A.*2d 8 (App. Div. 2004) (quoting *In re Guardianship of DMH,* 161 *N.J.* 365, 383, 736 *A.*2d 1261 (1999)), *certif. denied,* 182 *N.J.* 426 (2005).

In this matter, the trial court's findings that D.D. committed a sexual offense against T.S. and exposed himself to W.K. were supported by sufficient credible evidence. The uncontroverted testimony of Dr. Witt, whom the court found to be a "highly credible witness[,]" who gave precise testimony and who "would not be led by the questioners," agreed that if D.D. committed the act of abuse, as alleged, he "would clearly present a risk" to his children, that was "unacceptable." Dr. Witt was unequivocal. He stated: "if I assume he placed his penis against [T.S.'s] face, you don't need to go any further than that to know he's a risk so that's the most important thing." Dr. Witt further attested to the risk of harm to D.D.'s daughters if defendant, in fact, was fired from his job for looking at pornography, after having been previously disciplined, because "that certainly would raise concerns about his sexual compulsivity that much is obvious."

T.S. was ten and W.K. twelve when D.D. acted. The argument that the risk to M.D. and K.D., ages eight and seven, is remote and not "imminent and substantial" is hollow and attempts to minimize the factual findings based on this record. The law support's the court's actions to protect a child from becoming a victim of parental abuse. *See J. & E., supra,* 157 *N.J. Super.* at 493, 385 *A.*2d 240 ("Evidence of parents' fitness or unfitness can be gleaned not only [from] their past treatment of the child in question but also from the quality of care given to other children in

their custody.").

C.

We also reject the challenge to the admissibility of the evidence that D.D. downloaded child pornography on his work computer, resulting in the termination of his employment. Citing *N.J.R.E.* 404(b), defendant argues *Cofield, supra*, 127 *N.J.* 328, 605 A.2d 230, requires reversal.

Perhaps the trial judge's failure to perform a *Cofield* analysis resulted from her determination that D.D.'s possession of child pornography was not evidential when determining the ultimate issue of whether D.D. abused T.S. However, she did consider the evidence when determining D.D.'s compulsivity. The four prongs of *Cofield* should have been analyzed. *New Jersey Div. of Youth & Family Servs. v. H.B.*, 375 *N.J. Super.* 148, 181, 866 *A.*2d 1053 (App. Div. 2005). However, the trial court's conclusion that M.D. and K.D. were at risk was nonetheless supported by the finding D.D. abused T.S. and Dr. Witt's expert testimony that the act of abuse posed a risk of harm to D.D.'s daughters. The error in this instance was harmless. *R.* 2:10-2.

D.

With respect to D.D.'s arguments presented in Points IV, V, VI and VII, we have reviewed the record in the light of the written arguments advanced by the parties and conclude the issues presented by defendant are without sufficient merit to warrant discussion in a written opinion, *R.* 2:11-3(e)(1)(A) and (E). Also, based on our determination, we decline to address the issues raised in the cross-appeal. We make these limited comments.

The court did not rely on W.K.'s written

statement to make its finding of abuse and neglect. It is clear from the trial judge's opinion she merely considered W.K.'s testimony. Therefore, the provisions of *N.J.S.A.* 9:6-8.46(a) were not abrogated.

D.D. also suggests he was denied due process because the court would not admit his proposed polygraph results. The law has not wavered from the general premise that "polygraph results are not admissible in evidence in New Jersey." *State v. A.O.*, 198 *N.J.* 69, 83, 965 *A.*2d 152 (2009) (citing *State v. Domicz*, 188 *N.J.* 285, 312-13, 907 *A.*2d 395 (2006)). "There remains a 'lack of scientific consensus concerning the reliability of polygraph evidence, which in turn is reflected in the disagreement among state and federal courts concerning the admissibility of such evidence.'" *Ibid.* (quoting *Domicz, supra*, 188 *N.J.* at 312, 907 A.2d 395). Absent a stipulation by counsel, the Court "has not sanctioned and does not now entertain the admission of polygraph results." *Id.* at 86, 907 *A.*2d 395. "Although there are few reported decisions involving the admissibility of polygraph evidence in a civil suit, almost all courts that have considered the question have held that the results of a polygraph test or the refusal to take a polygraph test are not admissible in evidence." *Senders v. CNA Ins. Cos.*, 212 *N.J. Super.* 518, 520, 515 *A.*2d 820 (Law Div. 1986) (citations omitted).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

S/ Joseph Orlando
CLERK OF THE
APPELLATE DIVISION

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1165-OST4

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,
Plaintiff-Respondent,

v.

D.D.,
Defendant-Appellant,

IN THE MATTER OF
T.S., M.D. and K.D.,
Minors.

Argued April 26, 2006 - Decided JUL 14, 2006

Before Judges Wefing, Wecker and Graves.

On appeal from Superior Court of New Jersey, Chancery Division — Family Part, Hunterdon County, No. FN-10-26-05.

Gilbert G. Miller, argued the cause for appellant (Wronko & Loewen, attorneys;

Mr. Miller, of counsel and on the brief).

Peter D. Alvino, Deputy Attorney General, argued the cause for respondent Division of Youth and Family Services (Zulima V. Farber, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Andrea C. D'Aleo, Deputy Attorney General, on the brief).

Noel C. Devlin, Assistant Deputy Public Defender, argued the cause for the minor child-respondents (Yvonne Smith Segars, Public Defender, Law Guardian, attorney; Mr. Devlin, on the brief).

PER CURIAM.

D.D. appeals from a dispositional order entered by the trial court on September 23, 2005, limiting him to supervised visitation with his daughters, M.D. and K.D., now five and four years of age, respectively. The order also restrained him from having any contact with his stepdaughter, T.S., now fourteen years of age. D.D. did not contest that aspect of the order before the trial court and does not challenge it before us on appeal. After reviewing the record in light of the contentions advanced on appeal, we have concluded we must reverse.

D.D. was married to R.D. in 1998, and their marriage produced M.D. and K.D. D.D. and R.D. had both been married previously and R.D. had one daughter, T.S., from that marriage. D.D. did not have

any children until his marriage to R.D. D.D. and R.D. lived in New Jersey at the time of their marriage and up until May 2004. D.D. had worked for a number of years as a senior scientist at Roche Molecular Diagnostics. He was terminated from that position when it was discovered that, despite a prior warning, he had a large number of pornographic files stored on his computer at work. He was eventually able to obtain a new position in Minnesota, and the family relocated there in May 2004.

T.S. was unhappy with this relocation. In November 2004, she returned to New Jersey to live with her biological father, with whom, we infer from portions of the record before us, she had not had a close relationship.

R.D. and D.D. had been experiencing problems in their marriage even prior to the move to Minnesota, and in February 2004 they had commenced a marital therapy program in New Jersey with Pauline Dessertine, a marriage and family therapist. In March 2004, T.S. also began seeing Dessertine; this was primarily to help her cope with the impending move to Minnesota, about which she was unhappy. In April 2004, during one of her sessions with Dessertine, T.S. told Dessertine that she had never liked D.D. After the move, T.S. continued her therapy sessions with Dessertine over the telephone, as did D.D. and R.D.

The relationship between D.D. and R.D. continued to deteriorate, however, and in October 2004, D.D. filed a complaint in Minnesota, seeking a divorce; in December 2004 both parties, represented by counsel, executed a document termed "Marital Termination Agreement." In this document, each waived any claim for support from the other and

agreed D.D. would pay a child support obligation of $1,400 per month, commencing in January 2006.

Pertinent to this appeal, the Agreement recited that the parties understood that R.D. was returning to New Jersey with M.D. and K.D. and that New Jersey would be the primary residence of the children. The Agreement included the following provision:

> WHEREAS, the minor children of the parties are not yet attending school, the parties shall share equal parenting time of six months each per year until the eldest child, [M.D.] begins attending school. At that time, the minor children will reside with [R.D.] during the school year and with [D.D.] during the summer months.

The Agreement also recited, however, that Minnesota was "the proper jurisdiction within the contemplation of the Uniform Child Custody Jurisdiction Act to enter an Order regarding the custody, care and control of the minor children.

Following her execution of this Agreement, R.D. returned to New Jersey on or about December 19, 2004. She did not bring K.D. and M.D. with her. The two young girls remained with their father, D.D., in Minnesota for several weeks before joining their mother here.

On January 20, 2005, a Minnesota court entered a divorce judgment that incorporated the custody and visitation provisions of the December 2004 Marital Termination Agreement. In particular, it recited, "[j]oint legal custody is appropriate as the parties have demonstrated an ability to cooperate in the parenting

of their children, and the parties have also agreed upon a method to resolve disputes." It also stated, "[t]he best interests and welfare of the children will be served if the parties are granted joint legal custody and [R.D.] is granted sole physical custody subject to reasonable and liberal parenting time by [D.D.]."

On January 18, 2005, R.D. and T.S. attended a joint counseling session with Dessertine, during which T.S., at the apparent urging of R.D., related an incident which she said had occurred in August 2001, some three and one-half years earlier. T.S. related to Dessertine that she had been sleeping in the basement on a hot night when D.D. approached her, nude. She told Dessertine that D.D. knelt beside her and placed his penis on her face; she related to Dessertine that D.D. did this twice on the same occasion. Dessertine contacted Child Protective Services which, in turn, notified the prosecutor's office. The prosecutor's office commenced an investigation, at the end of which it declined to initiate any formal proceedings. The Division of Youth and Family Services, however, filed an abuse and neglect complaint against D.D. under Title 9, *N.J.S.A.* 9:6-8.21 to -106. Following a bench trial, the trial court entered the order which D.D. challenges on appeal.

At trial, T.S. said that on August 23, 2001, she brought her sleeping bag and blanket down to the basement to sleep because it was a hot night and the basement was cooler than her room.
D.D. was reading on a couch in the basement. He was intending to sleep there because he had injured his back in an accident a few months earlier and he found the basement couch more comfortable. T.S. spread her sleeping bag and blanket on the floor. T.S. said she

went to sleep while D.D. was reading. T.S. testified that she woke up at one point and the television was on. She looked at the screen and saw a woman giving a man a lap dance. She fell back to sleep. T.S. testified that she woke up at another point and D.D. was standing before her, nude. She said that he walked toward her and then knelt down beside her. According to T.S., D.D. rubbed his penis against her right cheek and forehead and then stood up and returned to the couch. She said the entire encounter lasted approximately ten to fifteen seconds. While in her initial report to Dessertine, T.S. said that D.D. did this twice to her that night; at trial, she said there was only one instance.

T.S. continued that she waited a few minutes, thinking that D.D. believed she was asleep. She then went upstairs to her mother and, crying, awoke her. She related the incident to her mother and said she had noticed a "really bad" smell. R.D. detected nothing on the girl's sleeping bag or blanket nor her face although T.S. told her mother that she had washed her face.

R.D. then went to the basement to confront D.D. R.D. admitted searching the basement for evidence but found none. D.D. said she went so far as to check his shorts and underwear, but she denied doing so. D.D. was adamant that nothing had occurred, and R.D. accepted his assurances. They spoke about T.S.'s earlier episodes of sleepwalking and that she had in the past spoken of "Grandpa Irv" (her biological paternal grandfather), who, she said, would rub her stomach. Later, both D.D. and R.D. spoke to T.S. together. D.D. assured her that he had done nothing to her and would never hurt her. At trial, R.D. said

she had accepted D.D.'s assurances because she was five months pregnant at the time and wanted to keep their marriage intact.

D.D. has raised a number of issues in support of his appeal. We do not find it necessary, however, to address all of them in detail.

D.D. asserts on appeal that the trial court lacked jurisdiction to deal with this matter in the first instance. D.D. did not raise the issue of jurisdiction before the trial court, but the question of subject matter jurisdiction can be raised at any time. *Macysyn v. Hensler*, 329 *N.J.S uper.* 476, 481, 748 *A.*2d 591 (App. Div. 2000).

* * *

Here, having reviewed the record, we are satisfied there was not an emergency situation sufficient to allow the court to exercise "temporary emergency jurisdiction." The incident between T.S. and D.D. occurred some four years prior to DYFS filing its complaint, and the record contains no evidence of any inappropriate conduct on his part in the intervening years. Further, when R.D. initially returned to New Jersey, she evidenced no hesitation or misgiving in leaving K.D. and M.D. in Minnesota with D.D. for several weeks. Additionally, there was nothing in the record to indicate that D.D. was scheduled to visit K.D. and M.D. in the near future. From all that appears in this record, K.D. and M.D. were not scheduled to see their father at all in the coming weeks and months. There was no emergency which required the intervention of a New Jersey court to protect these girls. Further, even if the trial court

had been warranted in invoking temporary emergency jurisdiction under *N.J.S.A.* 2A:34-68, it did not comply with the procedures contained in subsection (c) of the statute.

Defendant has raised several additional arguments. Defendant challenges the procedure by which T.S. testified in this matter. She did not testify in the courtroom, in the presence of D.D. and the attorneys; rather, she testified in the chambers of the trial court, in the presence of the trial court and the guardian ad litem. The other attorneys remained in the courtroom. They could hear T.S. through an audio linkup but did not have the opportunity to see her visually. D.D. maintains that this procedure violated his right of confrontation under the Sixth Amendment to the United States Constitution and did not comply with *N.J.S.A.* 2A:84A-32.4.

We reject so much of defendant's argument as relies upon the Sixth Amendment. Abuse and neglect proceedings under Title 9 are not criminal proceedings, and thus the Sixth Amendment's right of confrontation does not attach to them.

N.J.S.A. 2A:84A-32.4 permits a trial court, in certain instances, to take the testimony of a witness under the age of sixteen "out of the view of the jury, defendant, or spectators." *N.J.S.A.* 2A:84A-32.4(a). The statute provides for this procedure only if the trial court has made a finding "that there is substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court." *N.J.S.A.* 2A:84A-32.4(b). It specifies, however, that defendant's counsel shall be present at the taking of in camera testimony. *N.J.S.A.* 2A:84A-

32.4(d). Here, D.D.'s attorney was not permitted to be present but listened to T.S.'s testimony through an audio linkup.

Respondents contend that *N.J.S.A.* 2A:84A-32.4 is similarly restricted to criminal proceedings. The statute, however, is clearly to the contrary and specifies that it includes "any action alleging an abused or neglected child" under Title 9. *N.J.S.A.* 2A:84A-32.4(a).

Respondents point to cases recognizing the authority of a trial court to conduct an in camera interview of a child under *R.* 5:12-4(b). We have no doubt as to the power, indeed the obligation, of the trial court to do so in an appropriate instance. The cases cited by respondents, however, are distinguishable. *N.J. Div. of Youth & Family Servs. v. S.S.*, 185 *N.J. Super.* 3, 447 *A.*2d 183 (App. Div. 1982), for instance, was decided prior to the adoption of the statute.

N.J. Div. of Youth & Family Servs. v. L.A., 357 *N.J. Super.* 155, 814 *A.*2d 656 (App. Div. 2003), did not involve a situation in which plaintiff proposed to prove its allegation of abuse and neglect through such in camera testimony. Indeed, as we read the opinion, DYFS did not propose to call the child at all to establish its case. Rather, her mother, who was alleged to have abused and neglected her children, requested the court to interview the oldest child, and the trial court refused to do so. *Id.* at 160, 814 *A.*2d 656. We remanded the matter for further proceedings, including such an interview. *Id.* at 169, 814 A.2d 656. Nothing within our opinion addresses whether L.A.'s attorney should be permitted to be present during that

interview, as the statute directs. Here, on the other hand, the participants recognized that T.S.'s testimony was a critical aspect of this case.

N.J. Div. of Youth & Family Servs. v. H.B., 375 *N.J.Super.* 148, 866 A.2d 1053 (App.Div.2005), is similarly distinguishable. In that case, DYFS appealed from the trial court's dismissal of its abuse and neglect action. *Id.* at 155-56, 866 *A.*2d 1053. Among the bases we cited for reversing that determination was the trial court's refusal to conduct an in camera interview of the child. *Id.* at 182-84, 866 *A.*2d 1053. We did not address the question whether defendant's counsel should be present during that in camera interview.

Respondents assert that the manner in which the trial court conducted this interview assured that D.D.'s due process rights were protected. The nature of the record, however, precludes us from reaching that conclusion with any assurance. The record does not clearly indicate, for instance, that D.D.'s attorney was permitted to submit additional questions to the trial court to pose to T.S. after the initial portion of the interview. At oral argument, counsel took diametrically opposed positions. D.D.'s attorney strongly maintained he did not have that opportunity, while counsel for DYFS was equally as strong that he did. Unfortunately, the record does not answer the question either way. As a reviewing court, we decline to be placed in the position of accepting one representation over another. Further, that ambiguity in the record forecloses us from holding that the fact that D.D.'s attorney listened to T.S.'s testimony as she gave it constituted the functional equivalent of his being present for purposes of the statute.

Further, when the trial court was alerted to the

fact that R.D. may have violated the sequestration order and discussed T.S.'s testimony with her, it should have inquired directly of R.D., and not relied solely on the assurances of T.S. If, after questioning R.D., the trial court had concluded that she had violated that order, the trial court should have taken appropriate measures.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
S/ John M. Chacko
CLERK OF THE APPELLATE DIVISION

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3745-06T2

NEW JERSEY DIVISION OF
YOUTH AND FAMILY SERVICES,
Plaintiff-Respondent,

v.

D.D.,
Defendant—Appellant,

IN THE MATTER OF T.S., M.D. and K.D., minors.

Submitted January 7, 2008 - Decided January 17, 2008

Before Judges Sabatino and Alvarez.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hunterdon County, Docket No. FN-10-26-05.

Wronko & Loewen, attorneys for appellant (Gilbert G. Miller, of counsel and on the brief).

Anne Milgram, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Andrea C. D'Aleo, Deputy Attorney General, on the brief).

Yvonne Smith Segars, Public Defender, Law Guardian, attorney for the minors (Noel C. Devlin, Assistant Deputy Public Defender, on the brief).

PER CURIAM.

This child abuse and neglect case brought by the Division of Youth and Family Services ("the Division") against D.D. ("the father") and R.D. ("the mother") returns to this court on issues concerning the clarification and implementation of our opinion in July 2006. *See N.J. Div. of Youth and Family Servs. v. D.D.*, No. A-1165-05T4 (App.Div. July 14, 2006) (slip op. at 1). In that opinion, we held that the Family Part had lacked subject matter jurisdiction over this matter under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), *see N.J.S.A.* 2A:34-53 to -95, when it issued an order on September 23, 2005 imposing certain restrictions on the father's contact with his two daughters, M.D. and K.D. *D.D., supra,* slip op. at 9-10. We did so because the courts of Minnesota at that time were already exercising and had not relinquished jurisdiction over the children in

the parties' divorce action there, the children had not been living in New Jersey for six months, and our state's "emergency jurisdiction" under the UCCJEA had not been triggered. *See N.J.S .A.* 2A:34-54, -65, and -68. Consequently, we reversed the Family Part's order.

Following our opinion, the courts of Minnesota issued an order on September 7, 2006, relinquishing jurisdiction to New Jersey as to all issues relating to custody and parenting time, while retaining jurisdiction over the remaining issues in the divorce action. That order specified:

> Minnesota is an improper and inconvenient forum for all child custody and parenting time matters between the parties under the UCCJEA, this Court specifically declines jurisdiction over the child custody and parenting time matters, and jurisdiction of all child custody and parenting time matters shall be transferred to the State of New Jersey as the more appropriate forum to hear all child custody and parenting time matters. The remaining portions of this case shall continue to be heard in the State of Minnesota until further Order of the Court.

Thereafter, the Division returned to the Family Part seeking to reaffirm and enforce its September 23, 2005 dispositional order. The order was predicated upon proofs, as adduced in the Family Part's 2005 proceedings, that D.D. had committed inappropriate sexual contact with his stepdaughter, T.S., in August 2001 when she was the age of ten. Among other things,

the September 2005 order restricted D.D. from having contact with his daughters, M.D. and K.D ., except under the supervision of a person approved by the Division.[1]

When the case returned to the Family Part in the fall of 2006, however, the parties could not agree on the effect of our opinion, and the Minnesota courts' ensuing relinquishment of jurisdiction, on the order previously issued by the Family Part in September 2005. D .D. contends that the September 2005 order, and the proceedings in the Family Part that led to its issuance, are a legal nullity. Accordingly, D.D. argues that the previously-issued restraints are vacated, and the Division must start anew in the Family Part with a fresh application for relief and supporting proofs, to be considered de novo at a plenary fact-finding hearing. On the other hand, the Division and the Law Guardian appointed for the children contend that no such de novo hearing is required, and that the factual findings made by the Family Part in 2005 continue to have legal force. In particular, the Division opposes having T.S. appear in court and reiterate her accusations about the 2001 improper sexual contact, arguing that such a renewed appearance would be unnecessarily traumatic. The Division thus argues that only a limited evidentiary hearing, amplifying

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[1] The order also prohibited D.D. from having any further contact with T.S., a restriction that is not specifically challenged on this appeal. D.D. concedes that, unlike her stepsisters M.D. and K.D., T .S. was under the subject matter jurisdiction of the New Jersey courts when this matter was first litigated here in 2005.

and updating the facts and circumstances, is now necessary.

Faced with these competing interpretations of our prior ruling and Minnesota's reaction to our ruling, the Family Part judge convened a compliance review in this case on January 18, 2007. As the result of that review, the judge issued an order on that date that, among other things, continued the supervised restraints on D.D .'s visitation rights.[2] The judge also continued M.D. and K.D. in the care and supervision of the Division, with physical custody maintained by R.D. However, the judge also encouraged counsel to file a motion with this court for clarification of our opinion or other appropriate interlocutory relief. Accordingly, D.D. moved for leave to appeal, and we granted his motion.D.D. presents to us the following two points:

> POINT I
> THIS COURT'S OPINION REVERSED THE ABUSE AND NEGLECT ORDER AND DISPOSITIONAL ORDER WITHOUT QUALIFICATION, REQUIRING A NEW FACT-FINDING HEARING ON THE ALLEGED SEXUAL ABUSE OF T.S. AND THE ALLEGED CONSEQUENT ABUSE OR NEGLECT

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[2] The order also required separate telephones to be provided to the two daughters so that they could maintain verbal contact with their father, provided that D.D. did not use the phones to call the mother, R.D.

OF T.S., M.D. AND K.D.

POINT II

THE MINNESOTA COURT COULD NOT RETROACTIVELY CONFER SUBJECT MATTER JURISDICTION OVER M.D. AND K.D[.], AND THE FILING OF THE AMENDED COMPLAINT AFTER MINNESOTA TRANSFERRED JURISDICTION DID NOT PROVIDE THE TRIAL COURT WITH SUBJECT MATTER JURISDICTION; ACCORDINGLY, THE TRIAL COURT'S INTERLOCUTORY ORDERS PERTAINING TO M.D. AND K.D. MUST BE VACATED, AND THIS COURT SHOULD INSTRUCT THE TRIAL COURT THAT SUBJECT MATTER JURISDICTION WAS NOT RETROACTIVELY CONFERRED.

Having considered those points, and the competing arguments of the Division and the Law Guardian, we generally agree with D.D.'s contentions, with some caveats that we explain hereafter.

At the outset, we incorporate by reference the factual and procedural history embodied in our July 2006 opinion. That opinion unambiguously held that the Family Part lacked subject matter jurisdiction when it issued its orders in 2005.[3] *D.D., supra,* slip op.

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[3] We note that no party sought certification with the Supreme Court.

at 10-11. As stated in the body of our opinion and repeated at its end, our express disposition to "reverse" those orders is plain and unconditional. *Id.* at 2, 16. *See R.* 2:11-3(b) (opinions of an appellate court are to state "whether the judgment, order or determination below is affirmed, reversed or modified"). We meant just what we said. We did not mean to imply that we were leaving intact some vestige of those orders concerning M.D. and K.D., in the hypothetical event that the courts of Minnesota thereafter yielded jurisdiction to our state. Nor is there any authority under the UCCJEA that would have allowed the courts of Minnesota, as the original host state of M.D. and K.D., to confer in September 2006 retroactive jurisdiction to New Jersey as of 2005.

Although we appreciate the adversarial instincts of counsel to not yield a legal point unnecessarily, and also the desire to protect T.S. from undue emotional upset, the unavoidable consequence of our prior, unappealed finding that the Family Part lacked jurisdiction in 2005 to hear this matter as to M.D. and K.D. is that the case requires a de novo fact-finding hearing. Subject matter jurisdiction cannot be manufactured retroactively. *See Bengali v. Haveliwala*, 197 *N.J. Super.* 55, 59 (Ch. Div. 1984) ("[I]f it is determined that subject matter jurisdiction does not exist, nothing is before [the][c]ourt").

We also clarify that when the de novo fact-finding hearing is conducted, any proofs adduced from T.S., who is now the age of sixteen, shall be either taken in open court or, if the judge elects in his discretion to have her re-interviewed in chambers, *see R.* 5:12-4(b),

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all counsel shall have the right to either be present or to observe the child's responses contemporaneously through closed circuit television or a comparable video link, in accordance with *N.J.S.A.* 2A:84A-32.4. Consistent with our prior opinion, all counsel also shall be afforded the opportunity to submit to the court additional questions to pose to T.S. after the initial portion of such an interview.

Additionally, consistent with our prior opinion, the trial judge shall permit counsel to examine R.D. to determine whether she has ever discussed T.S.'s testimony or her interview responses with her, in violation of the court's sequestration order. A renewed inquiry of T.S. on such potential improper communications shall also be permitted. If such a violation is found by the court, it may fashion an appropriate remedy, which may include an evidential discounting of T.S.'s credibility.

These determinations do not render worthless the testimony and other evidence previously presented to the Family Part. For example, the sworn statements of R.D., T.S.'s interview responses, and other witness accounts in the prior record may function at the de novo hearing as the equivalent of depositions or former testimony. *See N.J.R.E.* 803(a) (allowing certain prior statements of witnesses) and *N.J.R.E.* 804(b)(1) (allowing certain former testimony in prior proceedings, where the proponent shows the present unavailability of the witness). The statements may be used for their truth or for impeachment, to the extent consistent with codified hearsay exceptions and with the other rules of evidence.

The Family Part shall conduct a case management conference within fourteen days of this

opinion, at which time counsel and the court shall arrange for the expeditious scheduling of a de novo fact-finding hearing. Pending that conference, the father shall not have visitation with M.D. and K.D. except on a supervised basis. Additionally, the Division provisionally shall continue to have care and supervision of the children, with residential custody with the mother and legal custody continued with both biological parents.[4] We impose these interim restraints only as a short-term precautionary measure, recognizing that the factual circumstances, and any ongoing risks to the children, may have changed for the better or the worse in the months that this matter has been pending on appeal.[5]

At the case management conference, the judge shall address the need for any ongoing interim restraints, and shall also consider whether such restraints should be maintained or modified pending the final hearing. The judge may also wish to order in

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[4] We interpose those conditions not because the September 2005 order or judicial findings of fact are legally binding, but do so in the nature of temporary relief based upon the filed allegations of the Division, similar to the form of interim restraints that are often issued when the Division applies for an initial Order to Show Cause.

[5] Although the time consumed on this appeal is unfortunate, we note that no party moved during the pendency of the appeal for a limited remand to address any time-sensitive issues respecting the children.

his or her discretion updated psychological evaluations, or other expert assessments.

The January 18, 2007 order of the Family Part is hereby modified, consistent with this opinion.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S., Plaintiff v. RONDA D., DAVID D., and STEVEN SMITH Defendants, In the Matter of the Guardianship of: T.K. and M.K., Minors	)	TRANSCRIPT OF TRIAL

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: March 11, 2008

APPEARANCES:

ANDREA D'ALEO, ESQ., Deputy Attorney General

PETER D. ALVINO, ESQ., Deputy Attorney General
Attorneys for the Plaintiff

JAMES R. WRONKO, ESQ. (Wronko & Loewen)
Attorney for the Defendant, David D.

LORI CIECKIEWICZ, ESQ. (Alessandro & Cieckiewicz)
Attorney for the Defendant, Ronda D.

AMY VASQUEZ, ESQ.
HAROLD BUSH, ESQ.
Law Guardians

* * *

* * *

THE COURT: Thank you. Okay, did everybody get the -- well, I don't have a date on the letter itself. But it was faxed to me on March 4, 2008 from the office of Jay Kuras and it is a letter of opinion with respect to Taylor's testimony, written by Pauline Dessertine, RN, MSN., the therapist apparently for Taylor and it was addressed to Mr. Hewitt (phonetic).
Did everybody get that?
MR. WRONKO: Yes, Your Honor.
MS. CIECKIEWICZ: Yes, Your Honor.
THE COURT: Okay, so Ms. D'Aleo, what is your intention with respect to Taylor? Are you going to --
MR. ALVINO: If I may, Your Honor, before we have this discussion, we might want to ask Ms. Dessertine to step out of the courtroom. I don't know where the

conversation is going to go, but she is going to be a witness.
THE COURT: Oh, okay. Ms. Dessertine?
MS. DESSERTINE: Yes.
THE COURT: Good morning.

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MS. DESSERTINE: Good morning.
THE COURT: Thank you for being here. I am going to ask you to leave for a few minutes while we chat about this whole testimony thing. Thank you.
MS. DESSERTINE: Thank you.
THE COURT: All right, Mr. Alvino.
MR. ALVINO: Your Honor, I think under the circumstances, what I would propose and I spoke with the Law Guardian about this, is that Taylor be questioned in court with all attorneys present. We would ask that Mr. D. not be present for that. And that she be questioned by Your Honor.
Certainly everybody can propose questions and I think after you've concluded, there should be an opportunity for people to propose additional questions, essentially in the way of cross examination. But I think that that would not only comport with the Appellate Division documentation, but be best calculated to lead to the best evidence that we can get.
I would refer the Court to the case of State vs R.W., the Supreme Court case talking about the fact that sometimes the best evidence does not come out of the courtroom because of when the aura of the courtroom becomes pressure built for children.

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So I think even without that, I think that that is best

calculated to get to the heart of the matter, which is why we are here.
THE COURT: Thank you. Ms. Vasquez?
MS. VASQUEZ: Thank you, Your Honor. Your Honor, Rule 5:12—4(b) states that the testimony of a child may, in the Court's discretion, be taken privately in chambers or under such protective orders as the Court may provide. At the last hearing I had requested that Taylor be interviewed, if necessary, in chambers with a closed circuit --
THE COURT: I don't have that.
MS. VASQUEZ: -- and that was, that's what I just wanted to state for the record, Your Honor. That's not available. But Your Honor, that would have been my first choice and it was discussed in the Appellate opinion.
Then Your Honor, since that is not available because of the Court's resources, then I would ask that Taylor be interviewed in open court, but without the stepfather present, and that Your Honor interview the child and all counsel can submit questions in accordance with the recommendation of the therapists.
THE COURT: All right, now for everybody's comment and I will go down the line and hear from

everybody, it seems to me that if we're going to be even handed about this, no party should be present. It should be the functional equivalent of what the Appellate Division described, that is the attorneys watching what is going on and offering questions. But because I don't have that video connection to be able to have the attorneys in a separate room, I propose that we have the attorneys in this room, that we

conduct it as testimony, but so that the attorneys can be present and offer questions for direct and cross examination, to be asked by the Court. But no parties be present.
So I'll here from you, Mr. Bush, first on that and then I'll go back around --
MR. BUSH: I take no position on that issue.
THE COURT: Okay. Ms. -- is it Cieckiewicz?
MS. CIECKIEWICZ: Cieckiewicz?
THE COURT: Cieckiewicz, thank you.
MS. CIECKIEWICZ: Your Honor, I just spoke with my client regarding the fact that she also would not be present when her daughter testifies. She feels that she is okay with that. I feel that is the best way to do it. I mean, given the fact that the child is 16, the case law, the statutes and also we have to remember

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the facts of this case and how it may impact the child.
THE COURT: And Mr. Wronko.
MR. WRONKO: Judge, the Appellate Division has, I guess, issued two opinions in this matter. The first one reversed for the method in which the questioning occurred last time. The second opinion basically confirmed that and referred to the appropriate court rules.
THE COURT: Well, the first was based on jurisdiction.
MR. WRONKO: Actually, it was based on both, but in any event it doesn't really matter. But it did give us, you know, some information.
At this point the young lady is about to turn 17. So if this hearing occurred five months from now, on August 1st, we wouldn't even be having this discussion. She clearly would testify as any other witness would from

the witness stand with everybody present and being questioned by all attorneys as they saw fit.
The letter from Ms. Dessertine and I think -- I don't know if Your Honor really has this in front of you, but she saw her one time recently in order to make a decision as to her ability to testify. I don't believe she has had any contact with Taylor since back

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in 2005. So this is not an ongoing counseling situation. She just did the one evaluation.
But her letter says, I've met with Taylor only once. The second appointment was canceled. Taylor was found to be mature and stable. She feels and I agree she we would be able to testify in the courtroom. She would like Mr. D. not to be present. Frankly, I think any victim in any case would like the defendant or the person accused not to be present, and it could be intimidating. That's no psychological problems resulting from that.
There is a concern on her part that cross examination "might" be hostile. And I think for the record if my cross examination, I think it's really directed towards myself, became hostile, I have no question that Your Honor would have stopped that long before it got to the area of hostile.
And then she recommends that the questions be asked by the Judge if possible. There is nothing in this report to indicate that she is going to be psychologically damaged or she is going to have any issues that would, you know, any emotional or mental distress if required to testify. There is really nothing there except saying that, well, she would probably like it better if the questions came from the

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Judge and Mr. D. was not present.

I think given her age, given the case law in this area, giving the court rules that does talk about someone 16 or, you know, younger and they talk about if there is a substantial likelihood the witness would suffer severe emotional or mental distress.

This letter from Ms. Dessertine doesn't even indicate there will be any emotional or mental distress, above that which is naturally inherent to any witness who has to testify.

So I would submit that there is absolutely nothing in the record before Your Honor that would justify any decision, other than proceeding in a normal fashion with Mr. D., with Mrs. Cichielo present in court. You know, they're going to be sitting among eight or six attorneys. That each attorney be allowed to cross examine as they see fit, —— keeping in mind that Your Honor will control that cross examination.

And Your Honor may control it in say a more stricter fashion, because the young lady is, you know, 16 and a half as opposed to, you know, 30.

So I see there is absolutely no reason not to proceed in the manner I have requested.

THE COURT: All right, I'll hear from Mr. Alvino.

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MR. ALVINO: Your Honor, I think that, you know, what we're looking for here is the best information that we can get. And the Supreme Court and I had said R.W., State vs D.R., 109 NJ 248, although it was addressing the admissibility of out—of—court statements. It points out that the courtroom setting often affects children's ability to testify credibly.

I think Your Honor has the discretion to try to mold this in a way that is best calculated to lead to the best evidence that we can get. And that I think, add to the scenario that we've laid out, is best calculated to do that.

THE COURT: Ms. Vasquez, anything else?

MS. VASQUEZ: Your Honor, I concur. The court rule I cited does give Your Honor discretion. And additionally it's backed up by the Appellate Court's most recent opinion in which they too expressed that they were concerned about protecting teens from undo emotional upset.

THE COURT: Ms. Cieckiewicz?

MS. CIECKIEWICZ: Your Honor, I think we can't lose sight of the fact today, the day of the hearing, the child is 16. And yes, it is about getting the best evidence. However, it's also about, as stated in statute, protecting the child form any severe

emotional or mental distress. And specifically again with the facts of this case and what is going to come to light and what she is going to be questioned about, I think we can't lose sight of that, as well as getting good evidence.

THE COURT: All right. I've read the latest opinion from the Appellate Division, Judges Sabatino and Alvarez and considered what counsel had to say, and I've also read the prior Appellate Division decision. And I believe that the wisest way to handle this and protect Taylor's best interests and she is at age 16 still a minor. She may be about to be 17, but she is still a minor. And I'm not convinced that the requests of Ms. Dessertine were just based on her opinion alone. I

think the input that she had from her single interview with Taylor makes it clear that Taylor has expressed concerns about testifying in a full courtroom with everybody present.

But I'm going to issue the following restrictions on her testimony. First of all -- or on the setting. First of all, because I don't have a video link to chambers, -- that would have been my first choice, but I don't have it, so I'm going to question her myself. I'm going to question her in the setting of this courtroom. I think I will probably do

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it sitting at counsel table and allow counsel to have submitted questions for direct examination ahead of time. Allow counsel to remain in the courtroom in the gallery area, listen to the answers and then submit questions for cross examination after they've heard the direct statements made by Taylor in response to my questions.

I think the only evenhanded thing to do is to ban all parties from the courtroom and anybody else, Division staff, anybody except of course, courtroom personnel. I have my sheriff's officer and I will have my court clerk present.

That will as effectively as I can do, simulate a interview in chambers with counsel watching it via video feed. I think it will enhance Taylor's comfort level, if that's possible, by sitting at counsel table with her rather than being on the bench and putting her on a witness stand.

And I think that ordering Mr. D. to be absent from the proceeding is too prejudicial to his side of the case, if I allow Ms. Cichielo to remain in the courtroom and

have the advantage of hearing it and suggesting questions to her counsel. That seems to be inherently unevenly treated. So I will have no parties in the courtroom while this is going on or anybody else

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except counsel and my staff.

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MR. WRONKO: Your Honor, the only witness I would have was Nicholas Lasallas. He is a former Chief

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of the Monmouth County Prosecutor's Office. He administered the polygraph to Mr. D..

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DIRECT EXAMINATION [OF PAULINE DESSERTINE] BY MS. D'ALEO:

Q. Ms. Dessertine, by whom are you employed?

A. Dr. Jay, J-A-Y, Kuras.

Q. And in what capacity?

A. I am a psychotherapist with him, a nurse psychotherapist with him.

Q. And what is your education?

A. I have a bachelor's degree in nursing, a master's degree in nursing. I'm a pediatric nurse practitioner. I have a certificate in psychiatric clinical specialization and I have an EDS in marriage and family therapy psychology.

Q. Okay and before being employed with Kuras Counseling, where were you employed?

A. I worked with a Dr. Amon Ramsey, R A M S E Y in

Skillman.
Q. And about what time frame was that?
A. Ten years.
Q. And how long have you been with Kuras Counseling?
A. Since '97 I believe.
Q. Are you employed there full time?
A. Psychotherapist's full time is not everyone else's full time. I guess the answer is no.

Q. Do you work anywhere else?
A. No.
Q. Okay, do you have any certifications or licenses?
A. I have a license in nursing that I work at, yes.
Q. Any certifications?
A. No.
Q. Okay, did you provide counseling to this family, the D. family?
A. Yes.
Q. And when was that counseling provided?
A. I didn't bring up all my notes, but I began with a couple, I testified to this before. I don't have all my notes.
Q. Do you need your notes --
A. I guess I do, I'm sorry.
Q. -- to refresh your recollection?
A. Yes, the whole --
Q. If you need to go get them, that's fine.
THE COURT: Thanks, okay.
MS. D'ALEO: Okay.
BY MS. D'ALEO
Q. Now, we're talking about when counseling for this family commenced.

A. I first did a marital interview with Ronda and

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David on February 10th, 2004.
Q. And how many sessions did you have with Ronda and David thereafter?
A. I think eleven.
Q. And what was the context of their counseling?
A. We were attempting to resolve the conflict in their marriage.
Q. Okay, did you have counseling sessions with any other members in the household besides Ronda and David?
A. At that point, no.
Q. Okay, did you ever provide any counseling to anyone else in the household?
A. Yes, to Taylor.
Q. Okay and when did this -- when did counseling with Taylor commence?
A. The first time I spoke to Taylor was I believe March 31st of -- one second, please. It's March 29th of 2004.
Q. Okay and what was the nature of the counseling you were providing to Taylor at that time?
A. At that point in time we were just trying to resolve the issue of they're going to be moving to Minnesota.
Q. Okay, after March 29th of 2004 how many

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sessions did you have with Taylor thereafter?
A. Four and then the one recently.
Q. Okay and how long did these sessions last, about?
A. It depends. I occasionally saw Taylor for just a few minutes after perhaps seeing her mother and children don't have long attention spans. So I tend to be pragmatic. So they might have been 50 minutes, but

they were more likely half hours. Each note itemizes what time I saw her.
Q. What were the topics discussed in the sessions with Taylor?
A. Generally normal adolescent issues, getting along with mother, father, her relationship with her stepfather.
Q. What was the relationship with her stepfather?
A. Very conflictual and argumentative.
Q. Did she provide you with specific incidences of the conflict?
A. That they would have arguments and then there was the instance of alleged sexual abuse.
Q. Okay, you've stated that they would have arguments. Did she ever tell you the nature of the arguments that they would have?

A I don't remember.
Q. Okay, with regard to Taylor's sessions with you, was there anyone else that was brought into the counseling sessions besides you and Taylor?
A. Mother was occasionally there.
Q. And about how many times was Ms. Cichielo brought into the sessions?
A. Nine, nine.
Q. Thank you. You've stated that one of the sessions there was discussions of an incident, information that you gathered from that session. What exactly was the information provided by Taylor to you and when was this?
A. This was January 18th of 2005.
Q. And what did she disclose to you?
A. The previous session, on January 11th, she had

said, had intimated that she might cry, something to do about a secret. And then on January 18th they came in, mother and daughter, obviously with the agenda of talking about the secret.
Q. And did you talk about the secret?
A. Yes.
Q. And did she disclose the secret to you?
A. Yes.
Q. What is the secret?

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A The secret was that there was an instance when they were in New Jersey in which her stepfather touched her face with his penis.
Q. Okay, did she give you a time frame when this took place?
A. Meaning?
Q. Meaning when the incident happened?
A. No, I don't remember.
Q. Did she disclose any other information with regard to the secret?
A. Yes, she described it in detail.
Q. And could you please describe the detail that she provided for you?
A. I can read you what I had written and what I therefore remember. Taylor was anxious, curled up with her back towards me on my couch. I have a couch in my office. Said she had to tell me so her "little sisters wouldn't be hurt." Related incident with father David in their family room in home in Flemington. She asleep and I put asleep in quotes because I remember there was
discussion or at least some perception on my part, was she pretending to be asleep, on her side on the floor.

Stepfather David was on the couch behind her. Taylor was aware that allegedly there was pornography on the television. Purportedly David stood up and she was

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aware he was naked. She reported father shut off a desk light and I up in parentheses, (but there was still light coming from a stairway). Taylor then reports three instances of his touching her face with penis. She does not believe he had an erection. She reports and to her mother previously a smell. One second. After relating this history, Taylor was crying quietly. She seemed relieved. Taylor dismissed from the session after we processed it. Mother upset, but contained. She, alluding to mother, worries about her younger daughters and "neighbors' girls" that he will be hiring to babysit them. And then I said our next session was February 3rd at 7:00 p.m.

Q. What did you do with the information that you gathered from that session?

A. I made a DYFS referral two days later at 4:00 p.m.

Q. And how did you make the DYFS report?

A. I called the 877 number and I also called the mother and told her I made a DYFS referral.

Q. After Taylor disclosed the secret to you, would you please describe in detail her demeanor?

A. I can't remember specifically, other than her being somewhat relieved and weepy.

Q. After you testified originally in the first

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hearing that we had in I believe it was August of 2005, did you see Taylor again for counseling?

A. I saw her a couple times after the case and then just

recently.

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Q. And the recent appointment, the most recent appointment?
A. Yes.
Q. Was what date?
A. I saw her on February 6th of 2008.
Q. And on February 6, 2008 what was the nature of that session?
A. I had been asked by DYFS to evaluate, reevaluate Taylor as to her emotional state and her ability to testify.
Q. And as a result of that counseling session, what was your recommendation on her ability to testify
A. That she was able to testify and was willing to testify.
Q. And did you author a letter regarding your recommendations?
A. I did.

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Q. What if any concerns with regard to distrust did you learn from the defendant during your counseling sessions?
A. Well, that was one of the primary issues of the marriage, because of the loss of job and the use of pornography that Ms. D. didn't feel that she could trust him.
Q. Okay and what information did you gather with regard to his termination of employment at Roche Diagnostics during your sessions?

A. I remember hearing the details of it, that it was being examined, investigated by Roche. There was much concern about it. That's all I remember.
Q. Did you gather any more information with regard to the relationship that Taylor had with David D. while you were doing your counseling sessions with this family?
A. Other than the thought that he was very hard on Taylor.

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[CROSS-EXAMINATION BY MR. WRONKO]:

Q. Your first counseling session, as I understand it, with Taylor occurred in March of 2004, specifically on March 29th, 2004? It's on Page 1 of your Taylor notes, if that helps.
A. I'm sorry, sir.
Q. It's on Page 1 of your Taylor notes?
A. Oh, okay. The most recent ones that I gave you all?
Q. 3/29/04.
A. Yes.
Q. And at that time you were seeing Taylor at her parent's request and it had to do with the impending move to Minnesota?
A. Yes, sir.
Q. And at that time Taylor was conflicted and she had to make a decision whether she wanted to go to Minnesota or to stay in New Jersey with her natural father?
A. That is correct.
Q. You then see her on April 5th, 2004 to I guess follow up on what you had begun a couple of days earlier?
A. That is correct.

Q. And at that time she indicated that she never liked Dave, Mr. D. and she basically would not entertain the possibility of seeing him any differently?
A. Yes, that is correct.
Q. Now, as of June 14th of 2004, when you next had a phone conversation with Taylor, she was now in Minnesota?
A. She was.
Q. So the whole family had moved to Minnesota?
A. Yes.
Q. Do you know when they moved to Minnesota?
A. I believe David moved there initially and then in May Ronda came with the children.
Q. Would you agree that David and the two young girls moved in April of 2004 and then Ronda and Taylor moved in May of 2004?
A. I don't remember it.
Q. Now, in June of 2004, during the phone conversation with Taylor, basically your notes indicate that and her and Dave were both respectful and argumentative towards each other?
A. That is correct.
THE COURT: Mr. Wronko, I'm sorry, I lost track of the time. It's 12:15 and I have to do an

uncontested. So I'm afraid we're going to have to stop here and we'll resume at 1:30.
* * *
CROSS EXAMINATION BY MR. WRONKO CONTINUED:
Q. Ms. Dessertine, on the two occasions, specifically March 29th and April 6, 2004 when you met with

Taylor, prior to the move to Minnesota, did she ever mention anything to you along the lines of what you later learned had occurred in August of 2001?

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A. One moment, sir. No, other than on April 4th of 2004 we discussed her never having liked David and yet I tried to explore with her that she might be able to see him differently and that she, at this point in time, being rather young had no insight into her role in their disintegrating relationship. And also at this point in time and I don't know what instigated this, perhaps I saw her physically maturing, but I discussed puberty with her and when puberty was discussed, Taylor's response was, I don't want that.

Q. That was actually on April 5th, right?

A. Yes, it was, sir.

Q. So in the context of those conversations about her not liking Dave and not wanting to look at him differently, she never said, I don't like him because he touched me or disrobed or became naked or anything along those lines?

A. I don't remember. That would be an assumption.

Q. Well, is it fair to say that if she had said on April 5th, 2004 that Mr. D. had molested her, you would have been on the phone to DYFS in pretty short order?

A. Yes, which I would.

Q. And with regard to June 14th, that's a phone

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conversation you had while Taylor was in Minnesota, correct?

A. Yes.

Q. And again, during that conversation she talked

about the parents arguing and the living situation and things of that nature, but she never mentioned anything about any kind of abuse or molestation by Mr. D. against her?
A. No, at least I did not note it.
Q. And again, if it had happened, I'm sure it would have made it's way into your notes?
A. If we discussed it, yes.
Q. Right. And on any of those three dates would it also be fair to say that she never mentioned that Mr. D. had acted improperly towards any of her friends as far as anything of a sexual nature?
A. No.
Q. So it -- it was one of those questions that was probably hard to answer. You would agree that she did not mention anything improper about Mr. D. and any friends?
A. No, I agree she did not, I'm sorry.
Q. Okay, it's one of those questions. Thank you. And then the next time you would have seen Taylor alone would have been February 23rd, I believe of 2005,

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which is after she returned to New Jersey and after the disclosure was made in January of 2005?
A. Yes, I believe so.

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Q. Now, after November 8th of 2005, I believe you did not see her again until February of 2008?
A. Yes, I think that is true.
Q. There was a couple of canceled appointments, but

the next time you actually saw Taylor was in February of 2008?
A. Yes, I believe so.
Q. Now, around December 25th of 2005 you wrote a letter to Christine Valoney (phonetic), I might be

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butchering that, of the Division of Youth and Family Services. Do you recall that letter?
A. No, I'm sorry, sir, I do not.

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Q. For now if you can just look at it and see if you recognize this letter and your signature?
A. Oh, yes.
Q. Okay, you now recall writing that letter to DYFS?
A. Yes.
Q. And would you --
THE COURT: What is the date of it again?
THE WITNESS: Apparently I'm very bad at that. Did you notice? It's not dated.
Q. Is there anything in there that indicates generally what time it would have been written?
A. Let me look.
Q. It says it's an addendum to a December 25th correspondence.
A It should be in here. I do not know.
Q. Well, can we agree it was written --
A. Yes, yes.
Q. -- shortly after December 25th?
A Yes, yes.
Q. And in essence this contains your opinion that as of some time shortly after December 25th that Taylor

does not need to be seen by you on any regular basis?

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A. Uh—hum.
Q. Yes?
A. Yes.
Q. And in fact you never saw Taylor again until DYFS requested that you evaluate her for ability to testify here in court during this proceeding?
A. Yes, that is correct.
Q. When you were going to meet with her in February of 2008, about a month ago, did you make inquiries as to whether she had undergone any counseling with anybody else between the end of 2005 and February of 2008?
A. No, I did not.
Q. As you sit here now you have no idea whether she has or has not undergone any counseling whatsoever during that interim period?
A. No, I do not.
Q. Did you during the February 2008 meeting inquire as to whether she had been in therapy or counseling or anything of that nature in making your decision about her ability to testify?
A. I did not.
Q. Did you anything except interview her?
A. No.

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Q. Now, it would be fair to say that as of November 22nd, November 23rd, 2004 there is nothing in your notes to reflect any concerns by Ronda that Dave had

sexually molested or had any inappropriate contact with Taylor?
A. Would you repeat that, sir?
Q. Sure. As of the November 23rd telephone conversation where Ronda talks about the computer being inside the safe and the e—mails. As of that time frame you had not heard anything from her that Dave had any inappropriate contact with Taylor?
A. No.
Q. Were you aware that Taylor left Minnesota to come back to New Jersey some time after Mr. D. had filed for divorce?
A. Yes.
Q. And about a month later Ronda had followed her?
A. I don't remember, but I believe that's true.

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Q. But would you agree that you had some meetings or at least I believe a meeting with Ronda and Taylor in New Jersey while the two young girls were still in Minnesota with Dave?
A. Yes, I believe so.
Q. And your notes would indicate that was on December 23rd, 2004? I think it's on Page 1 of your Ronda session I have it?
A. Yeah, that's what I'm struggling with. December 23rd?
Q. 2004, yes. Would it help if I showed you my copy?
A. Yes.
MR. WRONKO: I'm just going to show it to her, so she can find it.
THE COURT: Fine.
A. Is it December 23rd, '04?
Q. Yes.

A. I got it, I got it, I got it, thank you. Sorry.
Q. Okay. Do December 23rd notes reflect that Ronda is now home pending the divorce proceedings, which have been initiated in Minnesota?
A. Yes.
Q. And she advised you that David is to have the children, the two young girls until December 31st?

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A. Yes.
Q. And then thereafter the divorce decree that Dave would have them periodically I think were your words?
A. Yes.
Q. Ronda apparently was sad about the dissolution of the marriage and had some depression and she had rejected any medication, correct?
A. Yes.
Q. Your next appointment was to be on January 6, 2005, but that was canceled?
A. Yes.
Q. Then the following appointment I believe was January 7th, which was the appointment when the secret was mentioned that it would be revealed at the next meeting?
A. January 11th, I believe.
Q. 11th.
THE COURT: And who was that appointment with?
THE WITNESS: That was with both of them.
THE COURT: Mother and Taylor?
THE WITNESS: Yes.
THE COURT: Thank you.
Q. And that's when your notes indicate that

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there is some kind of a secret that would be revealed on the next meeting?
A. Yes, that is correct.
Q. And then the next meeting was the January 18th meeting wherein the secret was revealed?
A. Uh—hum.
Q. Did you ever have any --
A. Yes.
Q. I'm sorry. Did you ever have any discussion with Ronda and Taylor on January 18th about the fact that you were now obligated to notify DYFS about this information?
A. Having been in this situation before, I'm sure I did, yes.
Q. Okay, so they would have been aware that DYFS was going to know?
A. Yes.
Q. Do you know if Ronda asked you to hold off until January 20th for any reason?
A. No.
Q. Do you have a recollection as to why you didn't immediately make the referral, why you waited two days?
A. Perhaps I wasn't in my office. I don't know, to be honest.

Q. Well, on January 18th you saw both of them in your office or you're not sure?
A. No, I saw both of them in my office, yes.
Q. So, you could have made the referral January 18th?
A. I could have, yes.
Q. Do you have any recollection of waiting until January 20th because that's when the Minnesota

divorce was signed? Does that help you at all?
A. I don't remember knowing when and if the divorce was signed.
Q. Okay. But you do know on the 20th is when you made the referral?
A. Yes.
Q. Now, you've described what Taylor has told you and I don't need to make you repeat that. One of the segments she did indicate was that Dave was apparently watching porn on the TV. Do you --
A. Taylor.
Q. Taylor, --
A. Yes, please.
Q. -- told you that Dave was watching porn?
A. Yes.
Q. Did Taylor or Ronda for that matter expand upon what was meant by the word porn?

A. No, I don't believe so.
Q. Did you ask to describe what she saw?
A. I do not remember, sir.
Q. Was Ronda still in the room while Taylor was relaying this information?
A. I believe so, because if you notice the appointment before January 11th, sir, --
Q. Yes.
A. -- I had anticipated this being an individual meeting with Taylor and they came in together.
Q. Did you have any conversations as to wanting to have an individual meeting on the 18th?
A. I'm sure I anticipated and verbalized that I anticipated it being individual. But I having had occasions before, if the child is anxious I would much

prefer the mother or father to be there.
Q. As you sit here today, do you have a recollection as to why it was not an individual meeting with Taylor, if you know?
A. Because my recollection was that Taylor needed the support. She was very upset.
Q. She needed the support of her mother?
A. Yes, please.
Q. Would you agree that throughout all your meetings and conversations with Ronda and Taylor that

you were never informed that Mr. D. may have done something improper with any of Taylor's friends?
A. I don't remember being told that, sir.
Q. And if you had, that's probably the kind of thing that would make it front and center into your notes?
A. No, necessarily, because it's hearsay and about another individual. One has to be very careful about that. I might not have noted it.
Q. Would you have noted that without names if there was another potential incident had occurred?
A. Probably.
Q. I believe this was asked and answered, but I just want to be sure, with the exception of January 18th, 2005, that's the only date you had discussions as to the actual details of what had transpired back, back whenever?
A. Other than on February 3rd, '05, it was noted that Taylor had gone to Child Advocacy Office and had stated to me, it's getting easier to talk about it.
Q. Did you talk about it at that point or just note that was easier for her to talk about it?
A. It was easier for her to talk about it. I do not force

children to talk about abuse.
MR. WRONKO: One moment, Your Honor.

* * *

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RECROSS EXAMINATION BY MR. CIECKIEWICZ:
Q. When you released Taylor or it was your opinion that she no longer needed counseling sessions, was it true that it was her who came to you and said she didn't believe that she needed anymore sessions?
A. Yes, I believe that was the case.
Q. And why did she say that?
A. Because she felt she was doing fine.
Q. Now, in November or December of 2004, can you recall any telephone conversations with Ronda where she had told you that she wanted to speak to you about something that had happened concerning Taylor?
A. Yes, I previously had had it intimated to me that there was something rather horrific that had occurred.

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Q. When did you first find out?
A. I remember sort of, how to put this, insinuations when we would have phone conversations from Minnesota especially.
Q. When did -—
THE COURT: Who is we?
THE WITNESS: Ronda and myself.
THE COURT: Ronda and you, okay.
Q. When did that begin?
A. When they moved to Minnesota.
Q. Is it fair to say it was November or December of 2004?
A. Yes.

MS. CIECKIEWICZ: That's all I have, Your Honor.
MR. WRONKO: Is it my turn, Judge? I think so.
THE COURT: Yes, it is, Mr. Wronko.
RECROSS EXAMINATION BY MR. WRONKO:
Q. These insinuations occurred after Mr. D. had filed for divorce?
A. I do not have knowledge of that, sir.
Q. Well, you know from your notes that he filed in October, right?
A. Okay.

Q. And these insinuations were in November and December. Can you look at your, are they reflected anywhere in your notes, so we can know what date you're actually referring to, the insinuations?
A. I do not see that I made note of it.
Q. Okay, do you recall discussing with Ronda any concerns as a result of the insinuations she had that she would be leaving the two minor girls alone in Minnesota with Mr. D.?
A. Yes.
Q. Now, I believe you indicated that Taylor basically indicated that she did not need to be counseled by you any further,
A. Yes.
Q. And that would have been some time prior to your authoring Exhibit DD-1, which was the letter to DYFS?
A. Yes, sir.
Q. And the notes indicate that the last time you saw Taylor was on November 8th, 2005, which was the last time you saw her alone or in fact with her mother in the year 2005?

A. Yes.
Q. Is that when she told you she no longer needed counseling?

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A. I don't know, sir.
Q. Okay. There is an indication that on December 20th, 2005 an appointment was canceled by either Ronda or Taylor, some combination?
A Yes.
Q. And at that point Taylor was adjusting well to the high school in New Jersey and was exhibiting normal obedience and behavior problems?
A. Yes.
Q. So she didn't really need to be counseled by your or to your opinion by anybody at that point?
A. Yes.
Q. And you didn't counsel her, right?
A. Yes.
MR. WRONKO: Nothing further, Your Honor.

* * *

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[DIRECT TESTIMONY OF RICHARD VALLACCHI, ROCHE LABORATORIES]:

* * *

Q. Was there another time that you had personal knowledge of a problem with the contents of this computer drive?
A. Yes, in November, the end of November, beginning of December of 2002, I noticed that our file server was filling up rather quickly and I did a search real quick and found out he had 22 gigabytes of data on there and

compressed files.
Q. How does this volume of data relate to how much your average employee would have on their portion of the drive?
A. About 20 times usual, what you would usually see.
Q. Now, by the way, what if any action did Roche take ultimately after reviewing and speaking about this file?
A. He was relieved of his duties. I think it was against Roche policy, using computer use against Roche

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policy. That I found out later on.

* * *

Q. Now, in this 22 gigabytes you mentioned, what sort of data was contained in that?
A. 95 percent was in a folder called, reviewed, I believe it was. It was RAR files, which are compressed

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files and I tried to open them up with a evaluation copy and I saw they were pornographic type files. There was quite a few of them.
Q. How did you know that they -- first of all, were able to actually open them?
A. No, I was not able to open them. It was password protected.
Q Okay, so how did you draw a conclusion that they were pornographic in nature?
A. The file names.
Q. Okay. We'll get to that in a second. By the way, did you maintain digital copies of these files a Roche during the time that you -- since his termination?
A. Yes, yes.

Q. And do you know when he was terminated actually?
A. I believe it was January of 2003.

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* * *

Q. In the 22 gigabytes of data can you -- how many files were there, do you know?

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A. Best guess is around 400,000 plus.
Q. Okay.
THE COURT: What was the question, 400,000 plus what?
THE WITNESS: Files.
THE COURT: Files, okay.
THE WITNESS: In the 22 gigabytes of data.

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S.,	)	
Plaintiff	)	
v.	)	
	)	TRANSCRIPT
RONDA D.,	)	OF
DAVID D.,	)	HEARING
and STEVEN SMITH,	)	
Defendants,	)	
	)	
In the Matter of the	)	
Guardianship of: T.K. and	)	
M.K., Minors	)	

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: March 12, 2008

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AMY VASQUEZ, ESQ.
HAROLD BUSH, ESQ.
Law Guardians

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THE COURT: This is the Division of Youth and Family Services versus Steven Smith, Ronda Cichielo and David D.. Docket Number FN, as in Nancy, 10-26-05. Your appearances please?
MS. D'ALEO: Good morning, Your Honor. Andrea D'Aleo, DAG on behalf of the Division.
THE COURT: Thank you.
MR. ALVINO: Peter Alvino, Deputy Attorney General also on behalf of the Division.
THE COURT: Thank you.
MS. VASQUEZ: Good morning, Your Honor. Amy Vasquez, law guardian for Taylor.
THE COURT: Thank you.
MR. BUSH: Good morning, Your Honor. Harold Bush appearing as law guardian for [M.D. and K.D.].
THE COURT: Thank you.
MS. CIECKIEWICZ: Lori Cieckiewicz, attorney for Ronda Cichielo, formerly D..
MR. WRONKO: James Wronko, Wronko and Loewen,

for defendant David D., who for the record, I have sent to the second floor, so he's nowhere in the area while the lady comes in.
THE COURT: Thank you very much. All right. Today we were going to start off with the Court's

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direct examination and counsels' cross examination of Taylor, under circumstances that we discussed yesterday. Because I don't have a video feed for attorneys to watch my interview with her, we're doing a hybrid proceeding.
Here in the courtroom, I'll be at counsel table with Taylor. And I will ask counsel to either all be at the other table or in the gallery, whatever is more comfortable. I d0n't want to take away your writing surface, but I just want you to be able to see Taylor, but Taylor also not to feel as much the center of all attention as she would as if she were on the witness stand.
So, did everybody receive the proposed questions from the Division?
MS. VASQUEZ: Yes, Your Honor.
MS. CIECKIEWICZ: Yes, Your Honor.
THE COURT: Okay. They look fine. I may not ask every single one, but they certainly address what the substance of the testimony will be, as expected to be.
But the first thing we're going to have to address with Taylor are the sequestration issues. Whether she's discussed this with anyone since her interview with, was it Judge Rubin or Judge Buchsbaum?

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Judge Rubin.

And what was said, and as the Appellate Division points out, that may substantially or may not substantially lighten the weight that could be put on her testimony. We'll see what has transpired.
So, that will be the first thing I will question her about. And then I will give you the opportunity to cross examine her on the sequestration issue. Because I think if there's a serious problem with it, we may have to put more on the record before we get into the substance of her testimony. Yes, Mr. Alvino.
MR. ALVINO: Your Honor, maybe I misunderstood. It was my understanding that you were going to question her and then if there were follow up questions, they would, people would, counsel would propose them to you and you would ask them.
THE COURT: You may.
MR. ALVINO: Or --
THE COURT: I had not made up my mind on that, quite frankly, whether you could ask questions directly or whether I should ask all the questions. I know everybody in here has dealt with this kind of case many, any times. And so I would expect that nobody in here would take the usual cross

examination posture.
And so, I tend to think that you can ask questions directly. It would probably be more expeditious. And I don't, as I said, I don't expect anybody to be asking them in an aggressive or accusatory tone.
MS. VASQUEZ: Your Honor, I just wanted to state that was my understanding as well, what's been stated by Mr. Alvino. My understanding is that the questions are to be put (inaudible) writing to Your Honor who --

THE COURT: And is that your preference --
MS. VASQUEZ: That is my preference, Your Honor.
THE COURT: -- as the child's law guardian.
MS. VASQUEZ: It is. That is also what I prepared her for.
THE COURT: All right. Well, if that's what you prepared her for, then that's what will happen.
MS. VASQUEZ: Thank you, Your Honor.
THE COURT: Thank you. All right. It'll take a little bit longer, but it's well worth it. And I certainly don't want to surprise this young lady.
So, are we ready to have her in here? And where would you prefer to sit?

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MS. VASQUEZ: Your Honor, we can sit in the gallery.
THE COURT: In the gallery.
MR. ALVINO: That's absolutely fine.
THE COURT: Okay.
MS. VASQUEZ: And I can --
MR. BUSH: May I remain here, Your Honor?
THE COURT: Oh, absolutely, Mr. Bush. Yes.
(Child interview under separate cover)

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CROSS EXAMINATION [OF JODY Kemp] BY MR. WRONKO:
Q. How old is Wanda as we speak?
A. 17.
Q. When did she turn 17?
A. October.
Q. Where do you presently live?

MR. ALVINO: I'm going to just object if they're talking about an address in general. I don't think it's necessary, and I think --
THE COURT: Okay.
Q. The town is fine.
A. Flemington, New Jersey.
Q. Is it the same, at that time, address?
A. No. It's not.
Q. No. Okay. But you still live in Flemington?
A. I do.
Q. And your daughter goes to the Flemington

schools?
A. Yes, she does.
Q. And she goes to school with --
A. She does not.
Q. Different schools?
A. Now she does. Yes.
Q. How did you find out about the IM exchange?
A. My computer is immediately in the kitchen, and I oversee everything Wanda does pretty much. But immediately she came to me and said Taylor has just contacted me. And at that point, my husband and I both stood over her while she IM'd her back.
Q. Is that before or after you received the call from Ronda three weeks ago asking you to prepare this statement?
A. It was before I received the call. I actually then told, told Wanda that she could message Taylor back saying that Ronda should contact me.
Q. Did you give Ronda your new phone number or did she already have it?

A. I didn't have a new phone number.
Q. You had the same one you had back in the summer of '03 and '04 (inaudible). What did Ronda say to you about wanting to now get involved, (inaudible) inclined to do so?

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A. She basically told me that she wasn't allowed to disclose any details. But she had spoken to her caseworker and then we had a limited conversation and then she requested that Wanda come forward and tell her statement because they had to come back to court.
Q. Well, it's fair to say that you were contacted by the police, correct? Specifically, Det. Donaruma (phonetic) of the Raritan Township Police Department back in April of 2005. You recall that?
A. I actually think I was contacted twice. That was the first time. Yes.
Q. And when you were contacted back then, you declined to let Wanda be interviewed, prepare any statements for them, correct?
A. At that point, we did decline to interview Wanda. Asked repeatedly, she was afraid, and didn't want to be involved, and we respected her as her parents.
Q. What did Ronda say to you in the conversation that convinced you, or that changed your mind about now getting involved?
A. It was nothing that Ronda said. It was actually Wanda's decision. She told me that she would prepare a statement because she cared about what happened to the girls, and she was concerned. But she was adamant that she did not want to come to a courtroom.

(End of Tape 1)
Q. -- about the girls' involvement?
A. How does Wanda -- excuse me?
Q. How did she know about the girls' involvement in this case?
A. I think that I told her.
Q. How did you know about the girls' involvement in the case?
A. Because when I was contacted by Ronda in the very beginning, she told me that there was going to be an investigation because of the children.
Q. Because of Taylor?
A. Because of the two other children as well.
Q. The young girls.
A. Yes.
Q. Did you discuss with Wanda why she had changed her mind about now becoming involved?
A. No. She actually told me that she really just wanted this to go away and that, people to stop contacting her. And immediately, when that IM came through, the tears came. So, it's obviously still bothering her.
Q. Now, some time in the summer of 2003, that's when Wanda would babysit for the D.s who still resided in New Jersey?

* * *

[DIRECT EXAMINATION OF RONDA CICHELO]

* * *

Q. Okay. Now, in August of 2001, August 23rd of 2001, to be precise, where were you living?
A. We were living at 18 Chelsea Circle in Flemington.

Q. And who else was in the house there?
A. That was me, Dave, Taylor, [M.D.] and [K.D.]. Or [M.D.], sorry.
Q. Do you recall an incident taking place back there?
A. Yes. I do.
Q. Could you describe what that incident was?
A. Yes. Both Dave and Taylor decided to sleep in the basement that evening. I slept upstairs in our bedroom.
And approximately, I'm going to say twelve o'clock, Taylor came upstairs. And I thought I heard her crying in the bathroom. And she had come into the room and said to me that something had happened in the basement with Dave. And I immediately jumped up and I said what

happened. And she told me that he had rubbed his penis on her face.
Q. Okay. Now you said you thought that you heard her crying in the bathroom. What were your observations of her demeanor when you were talking to her?
A. She was very upset. She was practically jumping out of her skin. Every time the floor creaked, I guess she thought Dave was coming upstairs, and she was afraid that he would hear her telling me what she had to tell me.
Q. And this conversation with Taylor took place in the master bedroom?
A. Yes. It did.
Q. About how old was Taylor at that time?
A I'm going to say she was 10 years old.
Q. Now, why was she sleeping in the basement that evening?

A. In the summer, she did that quite often. Her -- she said that her bedroom was hot and it was cooler in the basement for her. So, she would sleep down there occasionally.
Q. Would any of the other children sleep in the basement?
A. No.

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Q. Would any other members in the household sleep in the basement?
A. Dave did on occasion as well. He was in a motorcycle accident, and he said that sleeping on the couch in the basement was easier on his back.
Q. You testified that you asked her what happened. She disclosed to you what happened. What did you do after you learned that information?
A. I asked her go to into her room and that I would go downstairs and talk to Dave.
I went downstairs and he was on the couch, asleep, I believe. I sat down next to him and I said I need to talk to you. I said Taylor just came upstairs and said that something happened.
And he immediately woke up and said what do you mean, what happened? And I said she said that you rubbed your penis on her face. And he immediately said he would never do something like that.
And I guess we continued the discussion. We went upstairs into the kitchen, and he swore up and down that he did not do anything. I should have faith in him, that he would never do something like that.
I don't know how long that conversation went on. We did go back upstairs, and Taylor was awake still. And we brought her into our room. And Dave spoke with

her briefly to tell her, you know, he didn't do this.
And I think that was pretty much it.
Other than the fact that when Taylor went back into her room, she was complaining of a bad smell that was on her blanket. I removed the blanket from her bed, and she went to sleep.
Q. Okay. I just want to back up. When Taylor went upstairs to talk to you, about how long did that conversation last?
A. I'd say probably 10 minutes, maybe 15.
Q. And then you went downstairs?
A. Because she also -- let me back up a little. She did say that there was something on her face that smelled bad. I didn't see anything. I didn't smell anything. But she said that she had been crying.
And I don't know if she washed her face off or --
but she was in the bathroom when she first came upstairs, so.
Q. Okay. And you went downstairs, and about
how long was your conversation with Mr. D. in the basement?
A. Maybe 10 minutes. I honestly don't recall.
Q. Did you do anything else in the basement?
A. I did, kind of ransacked the basement, hoping to find something, some kind of evidence that something

had happened. Not really sure what I was looking for.
Q. Okay. When you say ransacked the basement, could you be a little more descriptive? What did you do?
A. I had pulled apart the couch. I was hoping -- I don't know. I don't know what I was hoping to find. I don't know, tissues, something. I don't know.

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[CROSS-EXAMINATION -- MR. WRONKO]

Q. And you're looking for the tissues because I believe she told you that she -- the smell and there was something sticky on her face or something like that?

A. Yes.

Q. You didn't find anything?

A. I didn't find anything.

Q. You never did locate the smell?

A. I did not.

Q. Fair to say you checked Mr. D. pretty thoroughly?

A. I did.

Q. You made him disrobe to see if there was something askew?

A. I did.

Q. You acted like a mother trying to see if he had really done something, right?

A. I did.

Q. And fair to say there was no smells, no tissues, no fluid, no physical anything to indicate anything had happened.

A. I could not smell anything. However, Taylor could. And she was in her room telling me that it was making her gag.

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Q. And you tried to smell the pillow and the blanket but you just couldn't smell it?

A. I could not.

Q. Now, after --

A. At 10 years old, I don't even think you realize that there is a smell. So, that in itself meant something.

Q. After you finish your conversation and examination of Mr. D. in the basement, you and he went into the kitchen and basically continued your conversation?
A. Yes. We did.
Q. And then at some point, you went upstairs?
A Yes. We did.
Q. And Taylor came into your bedroom?
A. Yes. She did.
Q. At any point, was she sitting on Mr. D.'s lap or sitting next to him?
A. She was not sitting on his lap. The three of us were sitting on the bed, on the edge of the bed, and she was in between us.
Q. And while the three of you were sitting on your bed, was there any kind of a discussion about whether perhaps she was dreaming?
A. Dave spoke to her and said that he could never do

this to her, are you sure you weren't dreaming. And I think at that point she was just, she wanted to go to bed and be done with it. And she said I don't know, maybe I was. I don't believe that she thought she was dreaming, based on her reaction when she spoke to me.
Q. But her last words before going to bed were, I don't know, maybe I was dreaming.
A. Those were her words, But I believe she just wanted the conversation to end.
Q. And you had also discussed with Dave while you were in the kitchen, the possibility that maybe she was dreaming.
A. I did not discuss that possibility. He was insisting that that was what the issue was.
Q. Did you discuss at that point the dreams that

Taylor had about her grandpa, I think it's Irv or --
A. Irv.
Q. Irv. Did you discuss those dreams at that time or was that other times and places?
A. We did not discuss those dreams. And those were dreams that she had when she was three and four years old. And we didn't -- I did not know they were about

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her grandfather for, I don't know, maybe a years. because it was a recurring dream that she would have.
Q. Does she sleepwalk? Or did she sleepwalk back then?
A. She did. There were occasions.
Q. Was she sleepwalking in that 2000, 2001, 2002 range?
A. Possibly. I don't know. However, when she would awake from those instances, she had no recollection.

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Q. As I understand things, by some time in the fall of 2004, while in Minnesota, you were now aware of this incident in August of 2001 in New Jersey, correct?
A. Correct.
Q. You're aware that Mr. D. had been fired from Roche for having porn on his computer?
A Correct.
Q. And now you've heard that he had taken his shirt off and propositions the neighbor, I don't want to say babysitter because she wasn't a babysitter as far as you're concerned.

A. Right.
Q. But the neighbor, Wanda.
A. Correct.

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Q. So, you knew these three items?
A. Yes.
Q. And you didn't leave him. You didn't file for divorce. You didn't take the girls out of Minnesota, right?
A. I knew that we were going to be divorced. He filed.
Q. You knew he was going to file?
A. And I could not leave until that was finalized.
Q. So, you stayed in Minnesota, finalized the divorce and the custody issues --
A. Actually, it wasn't even finalized. I signed what I had to sign and left. And it became finalized in January and I wasn't even aware of the date it was finalized because I did not appear.
Q. Well, the agreement that you ultimately signed provided that Mr. D. would have rather liberal visitation with the two young girls.
A. I signed an agreement that I had to sign to be able to leave.
Q. I'm sorry. You had to sign an agreement to go to leave Minnesota?
A. Yes. That agreement had to be signed. It was not necessarily what I would have wanted. I did what I had to do to leave.

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Q. So, you did what you had to do to leave Minnesota and you came back to New Jersey?
A. Uh—hum.
Q. And then after the two young girls came back to

New Jersey, when was that? December 31st of 2004?
A. That sounds right.
Q. And then you had the January 11th and then a January 18th appointment with Ms. Dessertine?
A. Correct.
Q. When did you first learn or when did you and Taylor first discuss that you were going to bring this incident to light?
A. I think we talked about it briefly when we had the conversation about Wanda. And I said to her that, you know, maybe we need to report this because now it's you, it's the files at Roche, and it's this other little girl. And it just seemed to be too many
things. And I couldn't be in denial anymore.
Q. And you basically waited to report it until after the divorce was filed, you were back in New Jersey and you had all the girls in your possession?
A. Yes.
Q. When you reported it, you knew that it was going to be reported to authorities thereafter?
A. Yes. I did.

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Q. Had you discussed that with Ms. Dessertine, what she had to do once you told her?
A. I believe she told us that she would make the call to DYFS or whoever.
Q. So, you didn't have to make the call yourself because you knew that the counselor would make the call for you?
A. Correct.

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S.,	)	
Plaintiff	)	
v.	)	
	)	TRANSCRIPT
RONDA D.,	)	OF
DAVID D.,	)	CHILD INTERVIEW
and STEVEN SMITH,	)	
Defendants,	)	SEALED
In the Matter of the	)	
Guardianship of T.K. and	)	
M.K., Minors	)	

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: March 12, 2008

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Attorney for the Defendant, Ronda D.

MY VASQUEZ, ESQ.
HAROLD BUSH, ESQ.
Law Guardians

* * *

THE COURT: Taylor?
Taylor: Yes.
THE COURT: I'm Judge Bartlett.
Taylor: Hello.
THE COURT: Very nice to meet you.
Taylor: You too.
THE COURT: Okay. What we're doing here, spoke to your law guardian --
Taylor: Uh-hum.
THE COURT: -- Ms. Vasquez, about this right? And so, I'm going to be asking you some questions and it's all being recorded. You understand that?
Taylor: Yes.
THE COURT: And can you hear us, is the --
THE CLERK: I'm sorry, Judge. Purposely --
THE COURT: Can you? Oh, good. Okay. And any of the parties in this case, your mom, your stepdad, your father could have copies of the tapes that result from this. So, there's nothing about this that's confidential. And as you know, your law guardian is here and so are the attorneys for each of, the Division and for, and the

attorney for Mr. D. and the attorney for your mom. So, we're limiting the group that can attend

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this question and answer session to them. But obviously, they can talk with their clients about what is said, okay?
Taylor: Uh-hum.
THE COURT: And they're also going to give me some questions to pose to you after they hear your initial set of answers, all right? So, first of all, how old are you?
Taylor: I'll be 17 in August.
THE COURT: In August. What is your birth date?
Taylor: August 3rd.
THE COURT: Okay. And I guess I should have, for the record, what is your full name?
Taylor: Taylor Michelle Smith.
THE COURT: Okay. Do you have siblings?
Taylor: Yeah, [M.D] and [K.D.].
THE COURT: Okay. And those siblings are half siblings?
Taylor: Yes.
THE COURT: All right. On whose side? Your mom's side?
Taylor: (inaudible).
THE COURT: They are your mom's children --
Taylor: Yeah.

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THE COURT: -- not your dad's children. Okay.
Taylor: Yeah.
THE COURT: How old are they?

Taylor: (inaudible) and 17 (inaudible).
THE COURT: All right.
MR. ALVINO: (inaudible) maybe we should (inaudible) necessary.
THE COURT: Okay. I don't do that on interviews. But you feel that this was a --
MR. ALVINO: I think it is the Appellate Division (inaudible).
THE COURT: Okay.
MR. ALVINO: (inaudible)to address that issue.
THE COURT: All right. Thank you. Okay.
The attorney for the Division is asking that we swear you in. Do you know what it means to be sworn in, -- would you take an oath?
Taylor: Okay, (inaudible).
THE COURT: Okay. All right. Do you know what it means, what the import of an oath is?
Taylor: To tell the truth.
THE COURT: Right. Exactly. That is what the oath is. In fact, what it says, and I'm not

administering it to you now, but what, just to let you know and have a discussion about it. And what it says is that you swear to tell the truth, the whole truth and nothing but the truth.
And usually, there's a so help you God at the end of it because your hand is on the Bible. It doesn't have to be though. You can affirm without reference to the Bible.
What does it mean to tell the truth to you?
What is your explanation of what it means to tell the truth?
Taylor: I have to tell like, what you need, not like an opinion, but like, but what happened.

THE COURT: Okay. A factual account.
Taylor: Yeah.
THE COURT: And if you were to tell something that you knew is not true, would that be part of your responsibility?
Taylor: What do you mean, like?
THE COURT: What would happen, let me put it this way. Do you think there would be any consequences to you if you told, if you knowing told a falsehood?
Taylor: Yeah.
THE COURT: And what do you think those consequences are?

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Taylor: I would get in a lot of trouble.
THE COURT: Okay. All right. Then I will administer the oath. Could you stand please, Taylor. Place your left hand, if you want to, on the Bible. That's it. Raise your right hand and face my court clerk.
Taylor Smith, SWORN
THE COURT: Okay. Have a seat.
EXAMINATION BY THE COURT:
Q. Now, we're going to go to the events of August 23rd, 2001. Do you recognize that date?
A. Yes.
Q. Okay. And do you recall that something happened on that date that is the subject of these proceedings? Where were you on that evening?
A. All that happened in the basement, because it gets really hot in the house upstairs.
Q. Okay.
A. Because it's the summer (inaudible).
Q. And who would sleep downstairs?

A. (inaudible) David would sometimes, but sometimes I would too.
Q. Okay. So, Mr. D. was there alone sometimes and sometimes you also slept down there. What were the furnishings in that room?

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A. In the basement?
Q. Yes.
A. Well, you walk down, there is a desk like, right there when you came down to the left, we had it set up as a gym. And to the right, there was couches, a table and TV and (inaudible) in the back.
Q. Okay. And on what piece of furniture would David typically, and by David, we're talking about Mr. D., right?
A. Yeah.
Q. What piece of furniture would he typically sleep on?
A. He's sleeping on the couch.
Q. Okay.
A. (inaudible).
Q. And was he sleeping on the couch that night?
A Yes.
Q. And did you sleep, where did you sleep?
A. There's a couch and there's like a table. And then on the other side of the table, I had a sleeping bag on the floor from my bunk bed.
Q. Okay. Was anybody else down there that night?
A. No.
Q. Okay. Tell us what happened in your words.

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A. So, again, it was hot in the house. He was sleeping

(inaudible) and I was sleeping. And I woke up to him rubbing his penis on my face.
And he -- I really just sort of laid there because I didn't know what to do and I didn't want to like, wake up and have him say or do anything else.
So, he -- I like waited until he was done. It like, wasn't very long. And then --
Q. How long do you think it lasted?
A. It was like a few seconds and that was it.
Q. Okay.
A. And then, I'm pretty sure he went over to the desk and there's like a little light, and he turned it off. And then he went back to the couch. And then the TV, I guess he turned it on.
And like he was, somewhere like (inaudible) so I didn't remember that well.
Q. So, you were able to see what was on the television?
A. Yes. Because I was like right in front of it.
Q. Okay.
A. And then I waited a while, and then I went, like I got up and went upstairs. And as I was going upstairs, he asked where I was going. So I just said like, the floor was hurting my back and then I went upstairs and

told my mom.
Q. And did he rub his penis on your face once? Did this event occur just once that evening?
A. From what I remember.
Q. Okay. Did it occur any other time in your life, any other day in your life?
A. (No verbal response).
Q. And how many people were living in this household

generally at that time?
A. It was me and my mom, and I guess my one, (inaudible) I'm not sure if (inaudible).
Q. All right.
A. So, I don't really know.
Q. All right. What were you wearing that night?
A. I guess just -- I'm really sure exactly.
Q. You don't remember. What was David wearing?
A. He used to wear shorts, (inaudible) and that's like all I really remember.
Q. So, when you were, when this was occurring, you just pretended to remain asleep, is that right?
A. Yes.
Q. When you woke up, was it already happening?
A. Yeah. When I like, woke up.
Q. Okay. So, what is it that actually woke you

up?
A. I guess that. I mean, I don't really (inaudible).
Q. When, were there any lights on other than that light on the desk?
A. No.
Q. And the TV was turned on after --
A Yeah.
Q. -- this event had occurred?
A. Uh-hum.
Q. Okay. Did you watch the TV at all for any length of time? How long do you think you think you were watching while it was on before you went upstairs?
A. Like, only like a minute.
Q. So, you got up to --
A. And he turned it off. It wasn't on when I went upstairs.

Q. Oh.
A. So it was turned off.
Q. So, let's go through the sequence. You
wake up and then he finishes rubbing against you. And
then what happened?
A. He got up and went to the couch. And then he turned on the TV. And then I remember just like, laying there, because I didn't know what to do. And that's really all I remember.

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Q. And how long was it before you went upstairs after the, with him touching you?
A. Maybe three, four minutes.
Q. And did he know you were awake for any of that time before you went upstairs?
A. I don't think so.
Q. I know this is difficult. What was your perception of how his penis felt on your face? Was it hard, was it soft or do you have an impression?
A. (inaudible) it was hard (inaudible).
Q. Was there any odor to it or --
A. Yeah. Well, on my blanket like, I said I smelled something. And I remember telling my mom and I was sick.
Q. What was your mother's response?
A. She started (inaudible)and she went downstairs. And then as he walked upstairs from the basement. And she walked down and I stayed upstairs.
Q. Did they speak to each other?
A. Yeah.
Q. And could you hear what they were saying?
A. Not really (inaudible).

Q. And now, you gave this testimony or interviews with Judge Rubin. Do you remember that?
A. Yes.

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Q. After that, did you talk with your mom about this incident?
A. Like about what happened?
Q. Yes.
A. (inaudible) talk about it (inaudible).
Q. All right. Did you talk with your mom about what you told Judge Rubin?
A. No.
Q. Okay. Did you talk with anybody about this and what --
A. Well, my friends, like one, like maybe like my best friend, knows it happened. But (inaudible).
Q. Okay. Do you recall describing the whole incident to anybody since you spoke to Judge Rubin until today?
A. (No verbal response).
Q. What about your law guardian, did you describe it to her?
A. Yeah.
Q. Okay. Did you describe it to any of the other attorneys involved?
A. No.
Q. No. I need a yes or a no. Okay.
A. No.
Q. And has anybody questioned you about this

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incident since that time --
A. No.
Q. -- since you spoke to Judge Rubin?

A. (No verbal response)
Q. What was the next time you and David had any discussion or interaction (inaudible)? Did you talk that night?
A. Well, I remember being in the bathroom upstairs and he -- but I don't think he directly said anything.
Q. All right.
A. And he was still talking to my mom.
Q. Has anybody spoken with you about what to say today?
A No.
Q. You've been, you were in counseling with Pauline Dessertine for a while, is that right?
A. Yes.
Q. And did you tell her about the incident?
A. Yeah. I had to (inaudible). I didn't have to but we decided that later on too.
Q. Who decided?
A. Me and my mom decided that it would be best.
Q. Okay. And when did that happen?
A. A while ago. I don't really remember.
Q. All right. And who is Wanda?

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A. She used to be my best friend.
Q. And when was she your best friend? What years or what ages?
A. When I lived over there, that was like, I was really --
Q. When you lived in Flemington before you moved to (inaudible)?
A. Yeah.
Q. Okay. And how old is Wanda? What age is she compared to you?

A. She's a year older than me.
Q. And what is the significance of Wanda for this whole event?
A. The whole, the day after school was, we used to walk home together, she was my neighbor. And she, we went upstairs in her house and she was like, I have to tell you something. And (inaudible) like amaze me like, (inaudible) of what happened with Dave at my house.
So, I got home and I went downstairs (inaudible).
Q. Now, was this before or after (inaudible)?
A. It was after.
Q. Okay. Did Wanda ever stay with you when your parents were gone?
A. Sometimes she would come over.

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Q. Okay. Did you look upon her as a babysitter?
A. No one ever (inaudible) babysitter.
Q. When's the last time you spoke to Wanda?
A. Probably like (inaudible) on my computer saying we have to go to do the whole trial that it would be helpful if she could testify. I guess when Dr. (inaudible) and my mom called her mom or her mom called my mom.
Q. Did you and Wanda ever discuss the details of what happened to you or what happened to her?
A. No.
Q. Not even IM'ing?
A. No.
Q. Or email?
A. (No verbal response).
Q. Did you ever tell Wanda what happened to you?
A. I just said he did something similar, I guess. We never went into detail about it.

Q. You didn't. What was the most specific thing that she told you?
A. She just told me that, I'm guessing he asked her to babysit and she went over there (inaudible) and she went down and he started like undressing or something

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and talked to her and then he left. (inaudible).
Q. And who was she was babysitting for at that time?
A. I am like not sure. (inaudible) probably [M.D.] or [K.D.].
Q. Okay. Did Wanda babysit for [M.D.] and [K.D.] often? Who is younger [K.D.]?
A. [M.D.] I don't ever remember her babysitting. Maybe she would just like come over while I was babysitting them or something. But I don't ever remember her coming over to babysit. Because either my mom was home or he was home.
Q. Do you have any recollection of who called Wanda to come over and babysit?
A. I didn't even know that they called her, whoever did.
Q. And after Wanda told you what, as you describe, (inaudible) of what happened to her, did you tell he what happened to you?
A. No. I just said that something similar happened to me.
Q. Okay.
A. (inaudible)
Q. What was the most detailed thing you said to

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her?

A. That's all I said, that something similar happened.
THE COURT: Counsel, I'm going to ask you if you have any written questions that you would like me to add to questions already asked.
FEMALE ATTORNEY: I have no questions Your Honor.
FEMALE ATTORNEY: I have none, nothing.
THE COURT: Nothing. Mr. Wronko?
MR. WRONKO: Judge, written questions? I don't have actually anything in writing.
THE COURT: Okay. Would you like to write some questions down?
MR. WRONKO: I guess I could write them. I thought I'd relay them to Your Honor orally.
THE COURT: You may.
MR. WRONKO: Most of my stuff is by counsel table.
THE COURT: All right. Would you like to take a break?
MR. WRONKO: Whatever Your Honor --
THE COURT: And write them down or give them to me orally and I'll write them down.
MR. WRONKO: It's probably easier to do it orally (inaudible).

THE COURT: Okay. Please come up then and get your papers.
MR. WRONKO: Are you going to have a written (inaudible)?
THE COURT: If you would prefer to just give me the questions. We'll take a break. You give me the questions and we and we will bring the witness back. Is that what you want to do?
MR. WRONKO: I think it would be probably easiest if

you would just excuse the witness and then I can verbally give you what I'd like to ask.
THE COURT: Sure.
MR. WRONKO: Counsel may have some objections.
THE COURT: Okay. And Mr. Bush?
MR. BUSH: I have two questions, Judge, which I have written in my own illegible scrawl. Maybe I could follow Mr. Wronko's example and give those two requests to you orally.
THE COURT: Okay. Taylor, we're going to let you go for about five minutes. Please do not discuss what you've testified to or the incident or anything with anyone. You could take a breather, go to the ladies room or whatever you want to do. I'll have your attorney, your law guardian come out and get you at

that time, okay?
THE WITNESS: Okay.
THE COURT: Thank you. Off the record.
(Court stands in recess)
(Court resumes in session)
THE COURT: Let's go back on the record. It's now your opportunity to give me some more questions you want me to pose to Taylor.
MR. ALVINO: If I may Your Honor, we did think of one question we'd like you to ask just to clarify what he actually had on during the incident.
THE COURT: Okay.
MR. ALVINO: I believe she addressed what he had been wearing going to bed, but what did he have on when it happened.
THE COURT: Okay.
THE CLERK: Judge, I'm sorry to interrupt.

THE COURT: Yes.
(Court stands in recess)
(Court resumes in session)
THE COURT: Mr. Bush, questions that you had.
MR. BUSH: My two questions are these, Your Honor. The first question is did David D. ever say anything to you after the August 2001 incident in the basement about what happened in the basement.

That's my first question.
THE COURT: Okay.
MR. BUSH: My second and other question is, to your knowledge did David D. ever do anything harmful to [K.D.] or [M.D.].
THE COURT: Okay.
MR. BUSH: Thank you.
THE COURT: And Mr. Wronko.
MR. WRONKO: Yes, Judge. I'll try to do this in a manner which makes some sense. Initially with regard to the sequestration issue.
THE COURT: Uh-hum.
MR. WRONKO: The procedural history of that is that initially on August 9th, 2005, Judge Rubin had interviewed Taylor. On that date, the conclusions were she had no concerns testifying in court and she had no concerns with questions being asked by the attorneys. The following day, August 10th, we arrived to follow that procedure and Judge Rubin was advised that there had been a change in Taylor's position.
He was then specifically advised that she had spoken to her mother about the matter, had gone over some question with her mother, and she was now more comfortable if Judge Rubin would then ask the

questions.

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And then the testimony occurred on September 16th in chambers with Judge Rubin asking the question. I think the focus of the sequestration violation was not any conversations she had afterwards. But it was the evening of August 9th, the conversations with her mother who indicated she reviewed some questions and then she had changed her mind as a result of whatever interaction she and her mother had.
And I think the interaction between her and
her mother was what the Appellate Division was focusing
on as far as the sequestration order violation. Because the mother had already testified. Because the mother testified during the day of August 9th --
THE COURT: Right.
MR. WRONKO: -- and that night, whatever conversation occurred, which did include some question reviews, then the next day the method in which we would proceed had changed.
THE COURT: Okay. Thank you for that clarification. I was unaware of it. Any other questions?
MR. ALVINO: If I may, Your Honor, I actually agree with counsel on that, that that area can and should be explored. I just want to point out that there had been
a

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description by the law guardian at the time as to what led to her, just to make the record complete, as to what had led to her change of heart in terms of the law guardian's discussion with her. Didn't want you to be

left with the impression that there was just a conversation with the mother.
THE COURT: Okay.
MS. VASQUEZ: Your Honor, I was not law guardian at that time. I'm not recollecting from the record what that conversation is.
THE COURT: Thank you. Anything else, Mr. Wronko?
MR. WRONKO: Judge, yes. The witness testified --
THE COURT: Can I just ask -- was it Teri Appelson?
MR. ALVINO: Correct.
MS. VASQUEZ: It was.
MR. WRONKO: Yes.
THE COURT: Go ahead.
MR. WRONKO: She testified that the incident occurred on August 23rd of 2001. When she gave a statement to the police on January 25th of 2005, she wasn't sure when it occurred, but she did say it was when she was in school.

Obviously, I don't think Hunterdon County has school in August. But I think that should be explored as to how she knows this date and how she now knows it was in August when she was out of school as opposed to what she had said back on January 25th.
THE COURT: That date I believe was the question.
MR. ALVINO: Yeah. I -- that's where the date came out here. She didn't give a date. Your Honor asked her about the August 23rd, '01 incident.
THE COURT: I will ask if she recalls that she was in school when the incident occurred.

MR. WRONKO: Judge, the version she gave to the Prosecutor and to Judge Rubin indicate that the TV was on before anything occurred. And she described to the Prosecutor's office that porn was on TV.
When she gave her interview to Judge Rubin, she indicated that she later learned what it was a lap dance. So, I'd like you to ask who she later learned from or how she later learned that what she observed was a lap dance.
MR. ALVINO: Yeah. I just would object to the characterization that she said she later learned it was a lap dance. She later described it as a lap dance. She didn't say oh, I learned something

different.
So, I think it might be quibbling, but -- and I understand why counsel is trying to characterize it that way.
MR. WRONKO: Judge, that's the way Judge Rubin and she characterized it. Not my words. That she later learned what she had seen was a lap dance.
MR. ALVINO: You can go to the transcript if you need to.
MR. WRONKO: I have that. She also mentioned -- I'm sorry, are we --
THE COURT: Okay. Go ahead.
MR. WRONKO: She also indicated to Judge Rubin that it wasn't just her face, but it was her forehead as well that Mr. D.'s part came in contact with.
THE COURT: Are you suggesting that that's different from face?
MR. WRONKO: Well, she said cheek and forehead. She was specific that it was two separate locations as

opposed to one.
Judge, with regard to the statement that she gave on January 25th to the Prosecutor's Office. Actually, if I -- I don't know if this is in the package that Your Honor has previously been provided by

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DYFS. I know you were given a lot of stuff. But it might be easier if I hand you a copy of her statement to follow along with.
THE COURT: All right. Let's mark it.
MR. WRONKO: I think it's --
MR. ALVINO: We could just move it into evidence now if you want, Your Honor.
THE COURT: Okay. PD --
THE CLERK: PD-2.
THE COURT: 2.
MR. ALVINO: It's not moved in, but it's been marked as --
THE CLERK: PD-2 would be the video edition.
MS. D?ALEO: -- P-4.
THE CLERK: Excuse me?
MR. ALVINO: P-4
THE COURT: Well -- ,
MR. WRONKO: They're indicating it was pre-marked P-4. So, however --
MR. ALVINO: It's been pre-marked.
THE COURT: Well, no. Let's -- you're the one who's bringing it into this proceeding now. So, we'll mark it DD-2.
THE CLERK: DD-2.
THE COURT: And are you offering it into

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evidence, Mr. Wronko?
MR. WRONKO: I am not at this point.
THE COURT: All right.
MR. WRONKO: I am just providing it --
THE COURT: DD-2 for identification.
THE CLERK: DD-2 identified.
THE COURT: Thank you.
MR. WRONKO: Your Honor, I would respectfully direct your attention to Page 3 beginning at Line 28 through 34, which was Taylor's initial description given on January 25th to the police.
It indicates she woke up and he was watching TV and it was like porn. She thought she was dreaming, went back to sleep and woke up again and he was walking around naked.
And then if you follow onto the top of Page 4, that's when she indicated that he rubbed his penis on her face and went back to the couch. And then she indicates, "and he did it again".
And that is described, I think in a little more detail at the top of Page 5, where she indicates that she didn't really think anything of it, referring back to the part on the face because she figured "that's a dream or something". And then she indicates it happened again and that's when she went upstairs and

told her mom.
And it kind of follows onto Page 6 of 15 where they ask -- What was his penis like the second time he came back -- And she indicates, "Same as the first. It wasn't like, hard or anything."
Edited a lot, Your Honor, but it then continues on Page 9, the detectives go back to the subject.

THE COURT: And what on Page 9?
MR. WRONKO: They ask about the dream. And the detective says, "At first you said you thought it was", referring to a dream, "the first time he came over." And she says she didn't think he would do that. But when he came back a second time, that's when she knew it was not a dream.
She's testified here and also in the interview with Judge Rubin that it only occurred one time. Then he left and she went upstairs. So, she told the detectives it occurred two times. She thought the first was a dream. But after the second time, she
realized it was not.
I don't know how Your Honor would pose that to her.
THE COURT: Okay. Anything else?
MR. WRONKO: Your Honor, if you could just

confirm that she never liked Dave. It's discussed, we've heard from Mrs. Dessertine also on Page 12, where she didn't like him because he wasn't her real dad or whatever, and she just didn't like him. But if you could just confirm that she really never did like him.
Judge, with regard to -- I'm sorry, I don't want to move along too quickly.
THE COURT: Go ahead.
MR. WRONKO: With regard to the Wanda issue. She indicates that Wanda approached her about a year after her incident had occurred, which would be, I'm not sure when her incident occurred, but I guess generally speaking, August of 2002.
THE COURT: Well, what question do you want me to pose?
MR. WRONKO: Well --

THE COURT: That's not inconsistent with what she said.
MR. WRONKO: Well, she didn't put a time frame on it. She said she didn't know. And I would just like a time frame. If she agrees that it was about a year after her incident occurred. Just trying
to put a time frame on this whole Wanda thing.
And then my understanding is that she told her mother about Wanda for the first time the summer of

2005, which would have been when they were in Minnesota.
MR. ALVINO: I'm sorry, counsel. What was that last question? Could you repeat that? I just didn't --
MR. WRONKO: That Taylor told Ronda in the summer of 2005 about what Wanda had told her.
MR. ALVINO: Got you. Okay.
THE COURT: Okay.
MR. WRONKO: You could also clarify ??
MR. ALVINO: Oh, actually, let me back up.
Summer of 2005 we were in trial. That was when the trial occurred. Was it 2004?
MR. WRONKO: Okay. Then it would have been summer of --
THE COURT: Well, I'm not suggesting an answer. I'm just going to ask her --
MR. ALVINO: No, I --
THE COURT: -- when did you tell your mom about what Wanda told you.
MR. ALVINO: Right. Okay.
MR. WRONKO: Oh, okay. But you're right. It wasn't '05. It was the summer of 2004. Okay.
The other thing, Judge, is she has indicated that she

told her best friend about it, and then

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indicated that she told Wanda about it without details. I'm assuming Wanda is the best friend. But if you could just clarify that there isn't some other individual out there that we don't know about.

If you could ask her if after it occurred if she has a recollection of speaking with Mr. D. and her mother upstairs, indicating that it could have could have been a dream or something along those lines. And I know she testified that she didn't speak to him. But if you could just ask that question.

MR. ALVINO: Just, and I'm sure you would do it this way, Your Honor, but if there is that question, if there's a question about a dream, just opened ended as to if anybody brought that up.

THE COURT: Anything else?

MR. WRONKO: I don't think anything of significance from reading my notes of her interview here. I don't believe so, Your Honor.

THE COURT: Okay. Ms. Vasquez, if you would like to go get Taylor. I'm going to run into chambers for a minute. So, you've got until 11 at least. Okay? Thanks.

MS. VASQUEZ: Okay. Thank you, Your Honor.

MR. WRONKO: And Judge, for the record, we'll

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just resume our seats in the back of the room so you can have the counsel table.

THE COURT: Yes. Same positions. Right.

(Court stands in recess)

(Court resumes in session)

THE CLERK: Court is now back in session.

THE COURT: Please be seated.
Taylor Smith, PREVIOUSLY SWORN
EXAMINATION BY THE COURT:
Q. A few more questions. Okay? You understand that you're still under oath, right, Taylor?
A. Uh-hum.
Q. You talked about what David generally wore to bed. Do you recall what he was wearing that night?
A. No. I remember, I think he was wearing like, green shorts or (inaudible).
Q. Okay.
A. I, so, I'm not sure.
Q. Did he take any clothes off --
A I didn't --
Q. -- down in the basement or put any clothes on while you were there?
A. I didn't see him do anything.
Q. Do you recall that you gave a statement to some detectives -- oops. That's our microphone. So,

we're going to wait. Do you want to test it and see if it's still working? Thanks, Bonnie. Okay. Can you hear me? Good. Do you recall making a statement to a detective at some point?
A. From?
Q. From the Prosecutor's Office.
A. I don't, sorry, I don't remember.
Q. Okay. Did you ever have the impression or tell anyone that David was naked at any time that evening in your presence?
A. Yeah, he was when he was doing it.
Q. Okay. And how do you, how did that come about?
A I woke up and he was already naked, so.

Q. Okay.
A. I didn't see him take anything off or put anything on.
Q. Did David ever bring up that incident with you at any time afterwards?
A. No.
Q. So, you and he have never spoken about it, is that right?
A. Yes.
Q. Okay. Do you know if he ever did any

similar thing or anything harmful to [K.D.] or [M.D.]?
A. Not that I know of.
Q. Do you remember when the matter came to trial the first time?
A Yes.
Q. Judge Rubin was the Judge, right?
A. Yes.
Q. And during that trial, did your mom talk with you after she testified about the kinds of questions that were asked?
A. Before, the day before she did tell me some kind of questions that would be asked. But I was not answering them or saying anything. She was just saying something so that I knew what like, I was going to, like, I was prepared for what was going to be asked.
Q. Okay. And did she tell you what answers were appropriate?
A. No.
Q. Was -- do you recall telling anyone that you would be willing to testify on the witness stand?
A. I did at first.
Q. And then --

A. Yeah, I changed my mind.
Q. You did. Okay. And why did you change your

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mind?
A. Because I realized like, I was thinking about it and then I realized that like, the cross examination thing I guess, like I wasn't actually prepared as I thought I would be. Like (inaudible).
Q. And what sparked that to your mind? Do you remember?
A. I just -- it was kind of my own decision. Because it was before my mom even said anything to me about the question thing. So, I just realized that I'd be more comfortable making a statement (inaudible) anybody were here. (inaudible).
Q. Okay. How do you know what cross examination is?
A Well, like, they talked about it. And I watch like, court, the week before on TV.
Q. Okay. So, that's where your knowledge ??
A. Yes.
Q. -- of what cross examination can be like?
A. Yes.
Q. Okay. The date. I suggested the date. What's your own recollection of what month and/or date this occurred?
A. I didn't remember the exact date or anything.
Q. Do you recall -- all right. We know it was

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warm out.
A Yes.
Q. Because that's why you were in the basement.
A. I knew it was around like, I knew it was in August.

But I didn't know --
Q. Okay. Do you recall whether you were in school, attending school at the time?
A. No. I don't.
Q. Okay. Was the TV on that evening at any time before you woke up with him rubbing his penis on your face?
A. Not that I know of.
Q. Okay. So, when did you go to bed, do you recall-- Or just sleeping bag.
A. Yeah, I was on top of the sleeping bag. (inaudible) but that's, I don't remember exactly what time (inaudible) that it was.
Q. Do you remember the circumstances? Who was there first?
A. What do you mean, like --
Q. In the basement.
A. Well, we went down at the same time.
Q. You did. Okay.
A. Yeah.
Q. And do you recall whether you went to sleep

with the TV on or off?
A. I'm pretty sure it was off.
Q. You used the term lap dance. Did you know that term at the time or did you learn it later?
A. Yeah. I learned it later.
Q. Can you, -- I know this is difficult. But can you tell me what you saw on the TV that made you, you saw --
A. There was a guy sitting in a chair and then somebody came in and started doing things (inaudible) her butt on him. And that's all I really remember.
Q. Okay. And who, where did you learn the term lap

dance from?
A. Well, from kids, like everyone talks about stuff like that.
Q. You just picked it up at school --
A. Yeah.
Q. -- or among friends. What parts of your face did he actually touch with his penis?
A. (inaudible) pretty sure, it was just around like the cheek.
Q. Okay. And do you recall any discussion at any time about a dream similar to what happened to you?
A. I don't recall it. But I know like, what you're talking about.

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Q. Okay. Why don't you tell me how the concept of dreams get into this whole incident.
A. I guess when I was little, I don't really remember, but I had a dream about my grandfather pushing on my stomach or something like that. I'm not really sure, because I don't remember it. But my mom had said it to me before, but I don't remember the dream. I guess I was like three or something. And that is all that I like know of the dream.
Q. Okay. After you told your mom about what happened to you in August of 2001, did anybody suggest to you that that was a dream?
A. Well, they didn't say that it, like, it could have been but, I don't think anyone ever said -- my mom asked me if it was or not, but I said no. (inaudible)
Q. Okay. Do you recall whether, telling anyone that there may have been an -- earlier that evening a similar incident that you thought you were dreaming about or what could have been a dream?

A. I don't think so.
Q. Okay. How would you characterize your feelings toward Dave before then? Before that incident.
A. Well, when I was younger, (inaudible). I never

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really had strong feelings for him. But I kind of felt (inaudible). But I never was like, purposely mean to him. Like, we were nice to each other. And sometimes we would have arguments but settle it.
Q. And what about after that incident, how would you characterize your feelings towards him?
A. It was pretty much the same. Like our, my family (inaudible) house. (inaudible)
Q. Okay. All right. Do you remember how long after your incident Wanda told you about her incident?
A. I'm not sure. It was a while after.
Q. Okay. Do you have any sense of how much, how long after your incident that her incident occurred? Did you have any sense of that time?
A. No.
Q. When did you tell your mom what, about what Wanda told you?
A. We were in Minnesota and we were driving home from somewhere. And we were talking. She mentioned they were getting a divorce and then she asked if anything else had happened with my whole incident, and I said no, but. And then I said the thing about Wanda.
Q. You mentioned a few minutes ago in the first part of this interview that you told your best friend about it. Was that best friend Wanda or a current best

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friend?
A It's a current best friend. Someone I've been friends with since like third grade.
Q. All right. And what did you tell her? How much detail?
A. Not a lot of detail. Just saying like, what happened like.
Q. And did she ask you any questions about it?
A. No. She was pretty quiet.
Q. Did she suggest that anything more or less happened?
A. No.
THE COURT: All right. I think that's it.
Counsel? Is that it?
UNIDENTIFIED VOICE: Yes, Your Honor.
THE COURT: Mr. Wronko?
MR. WRONKO: (inaudible) have a discussion with (inaudible)
THE COURT: I'm sorry to keep making you go in and out. Your law guardian will accompany you outside.
(Court stands in recess)
(Court resumes in session)
MR. WRONKO: Judge, I will now be moving DD-2, statement into evidence. I don't think the State

had made that same proffer. So, if it's going to go into evidence. I would also move into evidence her prior testimony before Judge Rubin, which if they're all going into evidence, then we don't need to go any further with (inaudible).
THE COURT: Is there any objection to the transcript of the Judge Rubin interview or the, what's been marked DD-2 going into evidence? Any, counsel?

MR. ALVINO: Although I don't see an exception for it going in, and it is largely unintelligible, I don't (inaudible).
THE COURT: Sure. Mr. Bush?
MR. BUSH: Okay.
THE COURT: Okay. Ms. Cieckiewicz?
MS. CIECKIEWICZ: No objection.
THE COURT: Thank you.
THE CLERK: DD-2 into evidence?
THE COURT: I still have one consent or objection to go.
MR. ALVINO: We have no objection.
THE COURT: All right. Yes. Then they're both in evidence.
THE CLERK: If someone could give me a copy of that transcript. I have DD-2 here, but --

THE COURT: Great.
THE CLERK: -- I don't have the -- thank you.
THE COURT: Okay. Mr. Wronko, if you could do that.
MR. WRONKO: Yes.
THE COURT: I'd like to say goodbye to Taylor. So, if you'd go, Ms. Vasquez, just bring her in.
THE CLERK: Whenever you can, Mr. Wronko. I'll make a note of it, the transcript.
THE COURT: Okay. Taylor, I just wanted to thank you very much (inaudible) and wish you good luck.
Taylor: Thank you.
THE COURT: All right. Bye bye.
Off the record. (Remainder of proceedings under separate cover)

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S.,	)	
Plaintiff	)	
v.	)	
	)	TRANSCRIPT
RONDA D.,	)	OF
DAVID D.,	)	TRIAL
and STEVEN Smith,	)	
Defendants,	)	
	)	
In the Matter of the	)	
Guardianship of: T.K. and	)	
M.K., Minors	)	

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: March 31, 2008

APPEARANCES:

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Attorney for the Defendant, Ronda D.

MY VASQUEZ, ESQ.
HAROLD BUSH, ESQ.
Law Guardians

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[DIRECT EXAMINATION OF PETITIONER]

* * *

Q. Can you explain to the Court exactly how

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that transpired? Tell the Judge what happened?
A. Sure. As has been mentioned, I had a fairly severe motorcycle accident, as a result of that I had sustained some injuries. I had multiple surgeries and my back would, you know, give me problems. I had several discs that were blown out as a result of the injuries. So I would sleep in the basement on the couch down there. It was just more forgiving on those occasions where my back problems would flair up.
On this particular evening went down and was reading a book, whatever watching TV. A short time after I had gone down into the basement, Taylor came down also. She brought her sleeping bag, a pillow and as she had done on numerous, previous occasions, set up an area on the floor. It was a finished basement by the

way, it was carpeted and you know, fairly comfortable area. She wasn't sleeping on concrete or anything.
But as I said, she on numerous occasions she had come down and done that before. At some point, killed the lights to go to sleep. And the next thing I recalled was Ronda coming down the stairs and turning on the lights and waking me up. She immediately began to start searching through items on the floor where Taylor had been sleeping.

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I asked her, you know, what's going on? Where's Taylor? She said, oh, Taylor is upstairs. I need to check on something that she told me. And I said well, it sounded very strange to me. I asked her what did Taylor say? What's going on?
And Ronda said I need to check something and see if what she told me is true. Ronda continued to check through the sleeping bag, the pillow. She seemed to be feeling them with her hands, putting them into her face.
After she had done that, she then asked me to disrobe. At this point, I said look, you know, tell me what the heck is going on. And it was at that point that Ronda told me that Taylor, what Taylor had told her.
And I just, I didn't know what to say. I was pretty shocked, but I complied with her request. I disrobed. I gave Ronda my clothing. Again, she felt my shorts, my underpants, my t—shirt and put them to her face to smell them. And then she checked the area where I had been sleeping on the couch. She checked the pillow. And at this point, I asked her what she was looking for. She said Taylor said that something was wet and that she had smelled a bad odor, a bad smell.

At some point, I put my clothes back on.

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Q. Let me just stop you.
A. Yeah.
Q. Did Ronda ever locate anything that night, anywhere in the house that contained any kind of a bad smell?
A. No. In fact, after Ronda had finished checking me and the basement, she then asked me, you know, do you smell anything? And I smelled the pillow. I smelled the blankets, the sleeping bag and I couldn't smell anything either.
Q. Now, what allegations specifically do you recall being made by Ronda at that time?
A. Ronda said to me that I had put my penis on Taylor's face.
Q. Did you?
A. I did not.
Q. Now, after the examination in the basement concluded, where did you and Ronda go?
A. We both needed to kind of catch our breath a little bit. We went from the basement and went to the kitchen where we talked about the incident, trying to figure out what the heck was going on here. And from there, I think we went upstairs to the bedroom.
Q. Did you ever engage in a three way conversation that evening with yourself, Ronda and

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Taylor?
A. We did shortly after we concluded our discussion in the kitchen, we went upstairs to the second floor where our main bedroom is located and Taylor was in our

bed. The TV was on, there was a movie or a DVD or something playing, I don't remember what. And at that point, we shut the TV off and tried to talk to Taylor
about what had happened.
Q. Now, did you ever have a computer located in, whether you lived in Minnesota or whether you lived in New Jersey?
A. No, I did not.
Q. When you were terminated from Roche, they had located a file with names that would be indicative of pornography, correct?
A. That's correct.
Q. Did you download those files?
A. Yes, I did.
Q. Did you ever have an opportunity to view any of those files?
A. No, I did not.
Q. Could you explain first of all how you were able to download those files over the, I guess October, November period indicated by the Roche records?
A. I believe I got an e-mail from a hockey buddy, you

know, with a link to a directory that he had set up someplace, you know, indicating that there were some videos of our playoff games from the hockey team that I used to play for but no longer played for because of the injuries I had sustained. So I kept in touch with those guys and he said yeah, you know, check these out, that kind of an e-mail.
Q. Now, at some point, how were you able to download the file that appeared to be pornography? How did that come about?

A. Again, if I remember correctly, there was a link in the e-mail that he had sent me, clicked on the link and it just went to this file directory layout with just a list of different files that were located. It wasn't a website. It didn't have a name or anything. I couldn't even tell you what the link is anymore.
Q. And how would you go about downloading these files?
A. If you right click, highlight a file, right click on it, and then just do save as, a window pops up and you can save it as some file name.
Q. Did you in fact create a file name?
A. I did.
Q. Do you recall what the name of it was?
A. I think HIVCMV, I used some common acronyms that

are common to infectious disease research which is the area of my particular interest.
Q. Now, the Roche records indicate that these files were downloaded in October and November and some of them were saved at five a.m., three a.m., all kinds of different hours. Would you be physically present at Roche when the download completed and the file was saved?
A. No, I would not. It would just conclude on its own.
Q. And the file would automatically save itself?
A. Yes, after clicking on it, doing save as, it would just download it and it would be on the computer.
Q. Now, I take it, it's fair to say that at some point during this downloading process, you realized you could not gain access to the files themselves.
A. At some point, yeah.

Q. What was your understanding as to how you would ultimately have been able to obtain that access?
A. My understanding at the time was that you had to download all the packets, they came as packets and that 1t the conclusion of the download, there would be a password or key to unlock the files and thereby get access to them.
Q. Now, you would agree that the Roche records

indicated that the last group of files downloaded occurred in November of 2002, correct?
A. I believe that's what the dates were, yes.
Q. Once you realized that you could not access, well let me ask you this. Did any kind of key ever come down?
A. No, no I was unable to identify anything as a key or a password.
Q. What did you do with these files that you could not view?
A. I just left them on the computer thinking that at some point I would get the key but that was not forthcoming and they kind of just fell off the radar.
Q. Now, the document that has been moved into evidence makes reference to providing you with the amount of time in which you purchased a license, do you recall that?
A. Yes, I do.
Q. Did you ever purchase a license for any of these files?
A. No, I did not.
Q. The files also, the ones we saw live in court, you know, had indications that they had been attentive to the acts in I believe it might have been August of '05, things of that nature, would it be fair

to say by then you had absolutely no access to your work computer?

A. No.

Q. Once the download concluded in November and you could not view them, did you make any attempts in December to access any of these files?

A. No.

Q. And the same thing actually would go through January.

A. That's correct.

Q. Did you ever view those files at all?

A. No, I was never able to open any of the files that were contained in the download, no.

Q. Now, with regard to Wanda, there has been a letter purportedly from her which indicates that you went to the basement with a towel, sat down next to her, took the towel off and drew attention to the fact that you were completely naked. You reviewed that letter, at least we've heard about it here in court.

A. I've heard about it, yes.

Q. Did you ever do that?

A. I did not.

Q. There have also been allegations that perhaps you were in the basement with your shirt off and then you propositioned Wanda. Did you do that?

A. I did not.

Q. In any way, shape or form, did you ever proposition Wanda at all?

A. No, I've never, never.

MR. WRONKO: I have nothing further, Your Honor.

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SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S.,	)	
Plaintiff	)	
v.	)	
	)	TRANSCRIPT
RONDA D.,	)	OF
DAVID D.,	)	TRIAL
and STEVEN SMITH,	)	
Defendants,	)	
	)	
In the Matter of the	)	
Guardianship of: T.K. and	)	
M.K., Minors	)	

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: April 8, 2008

APPEARANCES:

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Attorney for the Defendant, Ronda D.

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MR. ALVINO: Two rebuttal witnesses we would like to call, Your Honor. First the Division would like to call Wanda Kemp. As she is a minor, Your Honor, we would like some consideration of that. And the only thing we're asking for is we're not asking for the Court to interview the same way that we did for Taylor, but we would ask that Mr. D. not be present in the courtroom when she testifies, and Ms. Cichielo obviously, too. What's good for the goose is good for the gander.

THE COURT: All right. Well, that's the proposal. Ms. Vasquez?

MS. VASQUEZ: You know, I don't represent this child. I don't necessarily take a position. I am concerned that she will be exposed to rigorous cross examination, that might cause her some harm, but that's again beyond my --

THE COURT: She's the same age as Taylor, right?

MS. VASQUEZ: Yes, Your Honor.

MR. ALVINO: In fact, one year older, Your Honor.

THE COURT: Oh, is she a year older?

MR. ALVINO: One year older.

THE COURT: So how old is she now?

MR. ALVINO: She's 17.
THE COURT: Mr. Bush?
MR. BUSH: I have no position, Your Honor on the pictures. Thank you.
THE COURT: Thank you. Ms. Cieckiewicz?
MS. CIECKIEWICZ: Your Honor, my client has agreed if that's your ruling that she does not have to be present.
THE COURT: Okay. And Mr. Wronko?
MR. WRONKO: Judge, I don't know anything about the young lady as far as, I mean, I know she is over 17, I don't know anything about counseling or any of that nature. But I think based on what we have, she should just proceed in the normal manner, like any other witness. There's really nothing to the contrary except she's 17.
THE COURT: My understanding is she had no contact with the D. family after the alleged incident, is that accurate, other than continuing to talk with Taylor, I guess?
MR. ALVINO: No, there were still, she would still go to the house until they moved.
THE COURT: She would still go to the house until they moved to Minnesota. Well, the allegations make her a victim although not one that the Division

has chosen to get involved with, or perhaps nobody wanted the Division involved. But I guess I'm not understanding why we wouldn't give her the same treatment that we gave Taylor because the allegation is
that she was a victim, just not the primary victim

alleged in this case. Anybody?
MR. WRONKO: That's going to be the next witness, Judge, should we just take our positions in the back of the courtroom again?
THE COURT: Yes.
MR. ALVINO: It will take us a few minutes to get her into the courthouse. And I would just ask, could we do the same thing? Could he go on the second floor when she's coming in?
MR. WRONKO: Yes, Judge, we'll follow the same procedure. Mr. D. will go onto the floor below us.
THE COURT: Thank you. Okay. Thank you.
MR. ALVINO: It will take us about five minutes to get her into the building.
(Court stands in recess)
(Court heard child interview in this matter)
(Court resumes in session)
MR. WRONKO: Judge, I think I'd better go get Mr. D..

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S.,	)	
Plaintiff	)	
v.	)	
	)	TRANSCRIPT
RONDA D.,	)	OF
DAVID D.,	)	CHILD INTERVIEW
and STEVEN SMITH,	)	
Defendants,	)	SEALED
	)	
In the Matter of the	)	
Guardianship of: T.K. and	)	
M.K., Minors	)	

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: April 8, 2008

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Attorney for the Defendant, Ronda D.

MY VASQUEZ, ESQ.
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Law Guardians

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COURT CLERK: This is Wanda.
THE COURT: Hi Wanda.
MS. D'ALEO: And we're not sure how you wanted to do the questioning. If you wanted to do it at a table.
THE COURT: I would like all the attorneys in the gallery. Wanda, you and I can sit at that table. You don't need to be on the witness stand. There's a gentleman in the room who is?
MR. ALVINO: Your Honor, we had spoke -- you did not have an objection to Wanda's dad being here. He's not going to be called as a witness. He certainly won't participate.
THE COURT: Okay. That's fine. Makes it a little bit more comfortable. Have a seat. Actually, before you have a seat, we'll swear you in. Left hand on the Bible, raise your right hand and look at my court clerk.
Wanda JEAN Kemp, PLAINTIFF'S WITNESS, SWORN
COURT CLERK: Please state your full name, and spell your last name.
THE WITNESS: Wanda Jean Kemp, K—L—I—N—E.
COURT CLERK: Thank you.
MR. ALVINO: Do I propose questions or --
THE COURT: I was going to take a break after

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I ask some questions and then I'll receive questions, okay?
MR. ALVINO: Thank you, Your Honor.
EXAMINATION BY THE COURT:
Q. First of all, you're how old?
A. 17.
Q. And the oath that you just took, what does it mean in your words?
A. (inaudible) tell the truth (inaudible).
Q. Okay. No elaboration and no half truths, right, the whole truth?
A. Yes.
Q. And do you believe that if you don't tell the truth when you're under oath, that there are any consequences for you?
A. Yes.
Q. Okay. So you take this seriously?
A. Yes.
THE COURT: All right. Any other questions?
MR. ALVINO: No, Your Honor.
THE COURT: (inaudible)
MR. ALVINO: Could we just ask that Wanda try to keep her voice up.
Q. I know this is difficult. The problem is counsel are back there and the microphone is here. Can

you hear well enough Bonnie?
A. Wanda Kemp.
COURT CLERK: Repeat that, please.
A. Wanda Kemp.
COURT CLERK: Perfectly. Thank you.
Q. If you could just keep your voice up to that level. First of all, I'm sorry that you have to be here. I know

this is not easy. Do you recall a summer between sixth and seventh grade?
A. Yes.
Q. And what year would that have been?
A It would have been, I'm not sure, -- I am a junior now --
Q. Okay. So summer of 2007 was sophomore to junior, 2006 would have been freshman, sophomore, 2005 would have been 7th to 8th. 2004 would have been 7th to 8th. And 2003 would have been 6th to 7th. Does that sound right?
A. (inaudible)
Q. Okay. Did you have an encounter with Steven (sic) D. --
MR. ALVINO: David, Your Honor.
Q. David, excuse me, David D. over that period of time?
A. Yes.

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Q Could you just describe it to me in your own words?
A Do you want me to explain what happened?
Q Yes.
A I remember going over to be with the girls. He had a chiropractor appointment I believe it was. We went to, I went over his house. The girls were taking a nap. I went in, went downstairs to play, which normally Taylor and I would do. He went up, said he would be back down in a few minutes. He was going to take a shower.
He came back down with a towel wrapped around him. Sat down on the couch. Then took the towel off and placed it next to him on the couch. Called my name, which tells me turn around and then I told him that I

wasn't comfortable and I went back upstairs.
By the time I had gotten upstairs and opened up the door, he put his hand on my shoulder and said this is our little secret. Keep it just between us.
Q Okay. How did that make you feel?
A Um, a little scared, but I didn't know what to expect. I didn't know anything, so I didn't know that it was not right for him to do that. I realized something was wrong but I didn't know what to say.
Q Okay. Was Taylor home at that time?

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A No, she was with her father.
Q Was her mom home at that time?
A No.
Q And when you say babysit the girls, you were referring to?
A Watching [M.D.] and [K.D.].
Q [M.D.] and [K.D.] Okay. What time of day was it?
A It was in the summer, I'm not sure. I think it was like mid—afternoon.
Q All right. And had you babysat for [M.D.] and [K.D.] before?
A Yes.
Q And had anything like this ever happened before?
A No.
Q Did Mr. D. explain why he was taking a shower instead of going to the chiropractor or whatever that appointment was?
A No. He had said that we were going to, he was going to take a shower and get ready to go and I remember him saying that it would just be easier if we all went in the car and then he would go in and then he could

just leave the girls in the car with me.
Q Okay. Did you babysit at any time after

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that?
A No.
Q Did you go over to the D. household at any time after that?
A Yes, I did, but only with someone at my side, whether it be Ronda or Taylor.
Q Okay. And about how many times did you go back to the D. house after that?
A I honestly don't remember. If Taylor and I were to play, it would most likely be at my house.
Q Okay. And whose choice was that?
A Basically mine.
Q Now, the attorneys for the various parties in this case, may want me to ask you more questions, but I don't know what questions they want. So I'm going to excuse you for about five minutes, discuss with them, what questions they want me to ask. We'll have a little discussion about whether they're relevant or not and then I'll ask you to come back in and undoubtedly we'll have a few more questions to ask you.
A Okay.
Q Thank you very much.
A You're welcome.
(Miss Kemp exits courtroom)
(Tape Off -- Tape On)

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THE COURT: -- at least part of the interview of Wanda Kemp by the Court. Now, I'm giving counsel an opportunity to request additional questions after the

Court's initial interview. So we'll start with the Division. Mr. Alvino.
MS. D'ALEO: Your Honor, I think that we would like to dive a little bit deeper into how long she has known Taylor? Who would ask her to babysit when she would go over to babysit? Did she get paid when she would go over to babysit?
THE COURT: Of what relevance is whether she got paid?
MS. D'ALEO: Your Honor, I'll withdraw it, that's fine. Also, we want to get into if she wanted to testify today, whether or not she was the one that wanted to come and testify, her position on being here.
THE COURT: Ms. Vasquez?
MS. VASQUEZ: Your Honor, I would just ask if she, if Wanda had ever told Taylor about this incident.
THE COURT: Mr. Bush?
MR. BUSH: Your Honor, I had wanted to amplify this on that question. And my question would be after the fact, who did she tell this to, if anyone and when? And of course, that would include, parents, Ronda and anyone else and when.

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THE COURT: Okay.
MR. BUSH: And the other question I had was, was there any further conversations she had ever with David D. about this event between the two of them? That's all I have.
THE COURT: Thank you. All right, and Ms. Cieckiewicz?
MS. CIECKIEWICZ: I don't have anything, Your Honor.
THE COURT: Mr. Wronko?

MR. WRONKO: Yes, Judge. Initially, if you could in her statement, the typed statement, she indicates that Dave was going to leave for an appointment and I don't remember where he was going.
If you could ask her between March 6th, 2008 when she didn't remember where he was going and now, how does she now know about this whole thing with the chiropractor.
THE COURT: Okay.
MR. WRONKO: Also, as far as the contact between her and Taylor, I believe Taylor testified that they had, I think it was instant messaged, or I think it was text message, I wasn't really sure, but the extent of their contacts between, well basically from today going backwards.

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THE COURT: Since Taylor moved to Minnesota.
MR. WRONKO: Or came back from Minnesota, I guess.
THE COURT: Okay.
MR. WRONKO: Also, I'm sorry.
THE COURT: Go ahead.
MR. WRONKO: I believe her mother testified along the lines that somebody had indicated that they had to write the statement to protect the two younger girls. If you could flush that out in the context of why she's now coming forward after basically having not done so from 2005 through I guess the March 6th, you know letter. Was there any --
THE COURT: Oh, wait a minute now. What do you mean come forward?
MR. WRONKO: Well, in Det. Donna Ruma (phonetic) of Raritan Township had attempted to interview her,

and the report I have isn't dated, but I believe it was in April of 2005, and the prosecutor was going to follow up. And essentially at that time, she wasn't cooperative at all. We do know --
THE COURT: Did the detective even speak with her or speak with one of her parents who basically prohibited the interview?
MR. WRONKO: Judge, unfortunately, I don't

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know. I wasn't prepared for her as an actual witness in light of what had transpired. I do know that she was never interviewed. I don't know if they specifically called her up and said can we interview you or if it was done by the parents. Det. Rabbi (phonetic) of Hunterdon, and I think this has come in through Ronda, through Jodi and indicates that Wanda said that Dave had propositioned her and Wanda said they were friends. And that was the extent of it. That was from back in April of '05. Obviously, it has changed. If Your Honor could explore that as well.
THE COURT: Well, wait a minute, where did that quote come from?
MR. WRONKO: Det. Rabbi's report which I think DYFS moved into evidence in that massive package that Your Honor, when everything came in except for the polygraph, it was in there, I believe. I apologize for not having it at the tip of my fingers, but I wasn't aware that the young girl had changed her mind.
THE COURT: Was Wanda interviewed or was somebody else interviewed?
MR. WRONKO: Wanda was not. My notes indicate that Det. Rabbi's information was told to her by Ronda and was told to Ronda by Jodi. I'm just

trying to find out --
THE COURT: It's a game of telephone.
MR. WRONKO: Well, it is, but if we could perhaps --
THE COURT: I'll find out if she was ever approached to give a statement before 2008.
MR. WRONKO: If we could find out what she told her mother, also what she told Ronda, what she told Taylor. Because I believe I heard that, you know, one version is she was propositioned. Another was that he had just his shirt off. Obviously, what we've heard today is different.
MR. ALVINO: I haven't heard that other version about the shirt off. But in this notion about proposition, as you said, I think third or fourth hearsay.
MR. WRONKO: Well, it's clearly third or fourth hearsay but then again, I'm not so sure that her statement was admitted in alone previously. So I don't know if we can really now prohibit some questioning of her based on, you know, potential hearsay, what she told people. And I think this might have been covered in Mr. Bush's questions, but the timing of the disclosures, especially as they relate to the family

moving to Minnesota and then in Minnesota and then apparently having come back from Minnesota.
THE COURT: I'm not sure this young woman is going to know what proposition means, that's my concern. That sounds like an adult characterization by one of the several adults in between what was said here in the record by her mother under oath and what was originally uttered by Wanda. So I'll ask her if the defendant said anything else to her along the line of

doing something to or with him. Anything else?
MR. WRONKO: Yes, Judge. I believe Taylor, and I don't recall if this is in her statement, her prior testimony which are both in evidence, had indicated that Wanda stated that Dave was in the basement with his weights, then he started to undress and Wanda ran out of the house. So that version came from Taylor. So there's no adult in between. If we could just explore that a little bit.
THE COURT: Okay.
MR. BUSH: And I have one other question, Your Honor.
THE COURT: Go ahead, Mr. Bush.
MR. BUSH: I think there is some point to asking when she did come over to babysit, what arrangements were made, but more importantly, who made

them between Mr. and Ms. D.. I believe there's testimony in the case I think from Ronda that she never, that is Ronda never arranged for Wanda to babysit.
THE COURT: Okay.
MR. BUSH: Thank you.
THE COURT: Mr. Wronko.
MR. WRONKO: I can't come up with anything in addition, Judge.
THE COURT: All right. Shall we, Mr. Wronko is still checking his notes. I don't want to foreclose you.
MR. WRONKO: Judge, I'm just briefly trying to go through my notes of her mother's testimony. I think anything that would probably arise out of there has been covered by various questions.
THE COURT: Okay.

(Tape Off — Tape On)
Wanda JEAN Kemp, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN BY THE COURT:
Q. Okay, Wanda, you remain under oath, understood?
A. Understood.
Q. Okay. How long did you know Taylor?
A. Since we moved in, I don't know how many years it

was.
Q. Do you remember about how old you were?
A. Maybe seven or eight.
Q. Okay. All right. And you moved into their neighborhood, your family did.
A. Correct.
Q. Okay. Who asked you to babysit typically at the D. household?
A. Depended, Dave was normally home so he would ask me. Possibly it was a weekend that Taylor wasn't home, Ronda may have asked. But most of the time it would have been Dave.
Q. Okay. Oh. What made you decide to come today? Are you here on your own initiative or did somebody ask you or how did you come to be here today?
A. Basically, it was talked about so I was asked to come and I decided that there's nothing to lose. It is only the truth coming out.
Q. Okay. And who asked you? A. The lawyers did and originally Taylor had asked me through IM and we had printed out the conversation.
And it was just that basically her asking me to say something (inaudible).
Q. Okay. And when did you decide that you would do this?

A. Just recently.
Q. Okay. Like within the last couple of weeks?
A. Yes.
Q. All right. Which lawyers asked you?
A I don't know.
Q. Did they ask you or ask you through your parents?
A. My parents.
Q. Through your parents. Did you ever tell Taylor about this event that occurred?
A. Yes.
Q. Do you remember when you told her?
A. I don't remember when it was, I just remember it was at my house.
Q. Okay. And was it before she moved away or when she was back visiting?
A. Before she moved.
Q. Okay. Did you at that point tell anybody else besides you and Taylor talking about it?
A. No.
Q. And then at some point later on after Taylor moved away, did you tell anybody?
A. No.
Q. Okay. Did you ever discuss it with Mr. D.?

A. No.
Q. Did you ever bring it up or did he ever bring it up again?
A. No.
Q. Now, at some point, it became known that this event occurred. What's your understanding of how that became known to your mom?
A. Well, after Taylor had moved she told her mother.

I don't know how long after. She told Ronda and then Ronda spoke to my father and my stepmom and then they spoke to me and then they found out.
Q. Okay. And when, how old were you or what grade were you in when your dad and stepmom asked you about it?
A. I don't remember. I think it was possibly freshman year, maybe, I'm not sure.
Q. Okay. So at least two years ago, would you say?
A. Yeah.
Q. Did anybody ever contact you directly, any police agents or police officer or prosecutor, investigator or detective or anything?
A. No.
Q. To talk to them about it.
A. No.

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Q. Okay. After Taylor came back from Minnesota, have you had any contact with her?
A. When she first moved back, we saw each other maybe once or twice. I knew where she had lived, but other than that, we didn't really talk much.
Q. Okay. Are you in school together?
A. Not now, no.
Q. Were you when she first moved back?
A. Yes, but we never actually like saw each other in the halls. We would pass each other maybe once and we would just say hi, that was basically it.
Q. Okay. Did you ever discuss this event (inaudible)?
A. No.
Q. And then the text messaging, when did that happen?
A. It was through instant messaging, which is over the

computer. It happened not too long ago, a couple weeks, I think.
Q. Okay. So this year, 2008?
A. Yes.
Q. And you gave a statement or wrote out a statement this year at one point.
A. Correct.
Q. Who asked you to do that?

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A. It was, I had decided it was either that or come to court originally. They decided that that was the best way to go.
Q. Okay. So did anybody ask you for a statement or you (inaudible)
A. I don't remember. It may have been my lawyer but I'm not sure.
Q. Okay. All right. Did David D. since the afternoon of the incident in 2003, did he say anything to you along the lines of doing something to him or with him?
A. No.
Q. Okay. Do you know what a proposition is?
A I have heard it, but I don't remember what it is.
Q. Okay. But you told us everything he said to you that afternoon.
A. Everything that I recall.
Q. Okay. Do you recall why he was in the basement, either when you first arrived at the house or after he took his shower?
A I don't.
Q. Do you recall saying anything to anybody about being, lifting weights?
A. No. There were a set of weights downstairs, but whenever I was over (inaudible).

Q. Okay. And you recall if you saw him using them that day?
A No, I don't.
THE COURT: All right. Counsel, (inaudible).
UNIDENTIFIED ATTORNEY: (inaudible) asked what she told Taylor the first time (inaudible).
Q. Do you remember when you told Taylor at your house what you said?
A. I honestly don't remember what I said or how I brought it up. I just remember telling her and her being very upset and telling me that we had to say something but I didn't want to.
Q. Okay. All right. Do you remember anything about whether you explained to Taylor the way you explained it today to me or whether you kind of glossed over it?
A. I honestly don't remember. I probably glossed over, but I honestly don't remember.
THE COURT: All right, anything else, Mr. Wronko?
MR. WRONKO: No, Your Honor.
THE COURT: Mr. Bush?
MR. BUSH: No, Your Honor.
THE COURT: Mr. Alvino?
MR. ALVINO: No, Your Honor.

THE COURT: Ms. Vasquez?
MS. VASQUEZ: No, Your Honor.
THE COURT: Thank you so much for coming in.
THE WITNESS: You're welcome.
THE COURT: It's very important that the Court hears directly from witnesses (inaudible) in the truest version as possible.

THE WITNESS: You're welcome.
THE COURT: Okay. Thank you, Mr. Kemp. You may head out. If anybody wants to (inaudible). Okay, thank you.

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
HUNTERDON COUNTY, NEW JERSEY
DOCKET NO. FM—10—26—05
A.D. No. A—4642—07T4

D.Y.F.S., Plaintiff v. RONDA D., DAVID D., and STEVEN SMITH, Defendants, In the Matter of the Guardianship of: T.K. and M.K., Minors	)	TRANSCRIPT OF CHILD INTERVIEW SEALED TRANSCRIPT

Place: Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

Date: September 16, 2005

BEFORE:
THE HON. STEPHEN B. RUBIN, J.S.C.

* * *

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A. I well to bed and then I woke up (indiscernible) back to sleep --
Q. Let's stop right there. You woke up. You heard the

TV or you just saw the TV?
A. I just kind of woke up (indiscernible).
Q. All right, so do you know what time that was approximately?
A. (Indiscernible).
Q. Do you have any idea?
A. (Indiscerhible) not real sure.
Q. Were there any lights on when you woke up?
A. No, it was like pitch black.
Q. The TV was on.
A. Yeah.
Q. Was the sound on the TV?
A. Yeah.
Q. And it was pitch black?
A. Yeah.
Q. Were you able to see what was on TV?
A. Yeah.
Q. what was on?

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A. There was a guy sitting on a chair and then like (indiscernible). I didn't know what it was called then but (indiscernible).
Q. Were they dressed or were they naked?
A. They were dressed.
Q. They were dressed, okay. Did you get up from your -- the sleeping -- this -- can you describe (indiscernible) -- was it a sleeping bag?
A. Sleeping bag.
Q. Is this on the floor?
A. Yeah.
Q. Is it like a camping bag?
A. Yeah.
Q. Okay, did you go (indiscernible) sleeping bag?

A. No.
Q. Were you able to see the TV from the sleeping bag?
A. Yeah.
Q. How far away from the TV were you?
A. A couple of feet.
Q. How far apart would you say?
A. Like probably like from right here to the wall.
Q. (Indiscernible) about ten feet.
A. Yeah (indiscernible).

Q. All right, do you wear glasses?
A. No -- well, I do, but I (indiscernible).
Q. Are you able to see the television set from about ten feet away?
A. Yeah.
Q. Okay, and I forgot -- I think I asked you if the sound was on and you said it was.
A. Yeah.
Q. Did you hear anything or were you just watching the picture?
A. I was just like watching.
Q. Okay, how long were you watching the picture.
A. Not that long (indiscernible).
Q. Okay, and where was Mr. D., if you know, when you were watching this?
A. (Indiscernible) I'm pretty sure he was on the couch.
Q. And how far away is the couch from where the sleeping bag was?
A. (Indiscernible).
Q. The size of my desk?
A. Yeah (indiscernible) maybe.
Q. All right, you described that when you got up, beside the television set, it was pitch dark.

A. Yes.

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Q. So there were no lights on.
A. (Inaudible).
Q. Is that right?
A. Yeah.
Q. And were you able to see or hear Mr. D.?
A. (Inaudible).
Q. No? Okay, so now (indiscernible) as you said, a couple of minutes or so?
A. I (indiscernible) back to sleep and --
Q. You went back to sleep. Okay, then what happened?
A. And then I woke up again and I saw Dave standing there and he was naked and then I didn't look down (indiscernible) I was like watching him. And then he came over and he knelt down like on one knee and he (indiscernible) his penis on my face. And I like (indiscernible) eyes or anything.
Q. Go ahead, what happened then?
A. And then (indiscernible) the basements were (indiscernible) laying I didn't know that -- and I couldn't really see it, but when he went to go turn it off, I kind of (indiscernible) and saw it.
Q. Anything else happen?
A. And then (indiscernible) couch. I waited a few

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minutes and I got up and went upstairs and then (indiscernible).
Q. What happened when you went upstairs?
A. I told my mom. I woke her up, I told her.
Q. You woke her up?
A. Yeah.
Q. And what did she do or say?

A. She went downstairs and (indiscernible).
Q. Were you present when she (indiscernible)?
A. No, I was upstairs.
Q. So you didn't hear what she said to Mr. D.?
A. Uh—uh.
Q. Did anything else happen that night?
A. Like with me and Dave?
Q. Yes.
A. No.
Q. All right, let's go back a little bit. You said you woke up again, correct?
A. Mm—mm.
Q. And when you woke up again, do you know wha time it was?
A. No.
Q. You said that Dave was standing there and he was naked, correct?
A. Yes.

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Q. Now, when you woke up, again, the second time, was there a light on?
A. (Indiscernible).
Q. So there was a light on when you woke up?
A. Yeah (indiscernible).
Q. Was the TV on?
A. I don't know.
Q. Was there a computer on?
A. Well, I couldn't really see the computer (indiscernible).
Q. Now, when you woke up, what made you wake up do you remember? Did you just wake up or was there something that caused you to wake up?
A. I just sort of woke up.

Q. And you said he was standing there, he was naked?
A. Yes.
Q. Totally naked?
A. Yeah.
Q. He had no shirt?
A. Uh—uh.
Q. No pants, no underwear?
A. Yeah.
Q. And when you first saw him where was he in relation to you?

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A. (Indiscernible).
Q. Facing you or facing the TV?
A. Facing me to my right.
Q. (Indiscernible) TV?
A. (Indiscernible).
Q. There was no TV on?
A. Uh-uh.
Q. He was just standing there naked?
A. Yes.
Q. And you could see him clearly?
A. Yes.
Q. And now we already established that the TV was about ten feet or so away from you, correct?
A. Yes.
Q. So that meant he came over to you, is that what you're saying?
A. Yes.
Q. And did he just walk over or --
A. Yeah, he just like walked over.
Q. Were you able to see his face?
A. Yes.
Q. Was there any expression on his face or did he say

anything to you?
A. No, he didn't say anything.
Q. And now, you know what a penis is?

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A. Yes.
Q. Okay, were you able to see his penis?
A. Yeah, I was like squinting, Your Honor, trying not to look.
Q. You were squinting but —-
A. I was like trying not to (indiscernible).
Q. You didn't (indiscernible)?
A Yes.
Q.. And did you notice anything unusual about his penis when he came over to you?
A. No.
Q. All right, and when he came over to you, were you still on your sleeping bag?
A Yeah.
Q. Were you covered up with your sleeping bag?
A. I (indiscernible) blanket.
Q. Okay, and when he came over to you —-
A. Yeah.
Q. —- do you think he believed that you were sleeping or up?
A. I think he thought I was sleeping. I don't think he would have done it if he knew I was awake.
Q. Okay, so you were pretending that you were kind of sleeping, is that what you're saying?
A. Yes.

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Q. All right, and then what did you observe him do?
A. Well, he knelt down and then he put (indiscernible)

on my face and --
Q. He knelt down on what, one knee?
A. Yes.
Q. Was he doing —— did he rub —— you say, rubbed it on your face, rubbed what on your face?
A. His penis.
Q. What part of your face?
A. Like my cheek.
Q. You're pointing to your right cheek, or was it all over your face?
A. It was just like here (indiscernible).
Q. You're pointing to the right side of your face.
A. Yeah.
Q. Is it on your cheek or was it above your eye or where?
A. It was like here and here.
Q. When you say here and here, you're pointing -- you're touching your right cheek and your right forehead.
A. Yes.
Q. Did he actually place his penis on your face?

A. Yes.
Q. Did you notice anything about it?
A. (Indiscernible).
Q. You're talking about size, right? Did it appear hard or soft, do you know?
A. (Indiscernible).
Q. Okay, did you notice any odor or anything coming from it?
A. Yeah, well, when I went upstairs (indiscernible).
Q. I'm sorry?
A. When I went upstairs I (indiscernible) blanket

(indiscernible) I was crying (indiscernible).
Q. You smelled it on your blanket?
A. Yeah, because I had it like that (indiscernible).
Q. When he rubbed his penis on your cheek, as you said, were you still pretending to be sleeping?
A. Yes.
Q. You didn't move at all?
A. Uh—uh.
Q. You said no?
A. Yeah.
Q. Okay, was he holding —- what was he doing with his hands?
A. He was just like holding it and --
Q. He was holding his penis with his hands?

A. Yes.
Q. Do you know if it was one hand or both hands?
A. It was one.
Q. Do you know which hand he was using?
A. I think it might have been the right (indiscernible), I think, I'm not exactly sure.
Q. Do you remember, and again, I'm just asking you for as much detail as possible, do you remember which knee he was on, his left knee or his right knee?
A. I think it was his left.
Q. So he was on his left knee?
A. Mm—mm.
Q. And so he was very close to you then?
A Yes.
Q. Where was his face?
A. I wasn't really ——
Q. Did you see his face or just his penis?
A. Well, I like closed my eyes because I didn't want to

like see it.
Q. But you're sure of his penis?
A. Yes.
Q. Okay, and how long did this encounter last?
A. Not that long, maybe ten, fifteen seconds and he got up (indiscernible).
Q. During this ten or fifteen seconds, what was

he doing with it other than rubbing it across your cheek?
A. Nothing.
Q. And then he got up?
A. Yeah.
Q. Were you able to see his buttocks when he got up and walk around?
A. Yes.
Q. He had nothing covering his backside, is that right?
A. Yes.
Q. Now, at what point did you get up from where you were?
A. Well, he went to the light and then went back to the couch. I waited a few minutes and then I got up and went upstairs.
Q. Did the light stay on?
A. What light?
Q. The small light that you were talking about?
A. No, he turned it off when he went over there.
Q. Okay, he turned the light off when he went over to the couch. And what did he do when he got to the couch, do you know?
A. I'm not sure (indiscernible).

* * *

* * *

Q. When Mr. D., as you say, approached you (indiscernible) and had rubbed his penis on your face as you described it -- I believe I asked you if it was hard or soft or how would you describe it? What was the word that you used, do you remember?
A. I think (indiscernible) it wasn't hard, it was just soft.
Q. Just soft?
A Yes.

* * *

HUNTERDON COUNTY PROSECUTOR'S OFFICE

NAME:	Taylor Smith
ADDRESS:	. . .
	Flemington, NJ 08822
TAKEN AT:	Child Advocacy Center
	Main Street
	Flemington, NJ
DATE:	January 25, 2005
QUESTIONS ASKED BY:	Det. Jeanne Rabii, Hunterdon County Prosecutor's Office
WITNESSES PRESENT:	None
TRANSCRIBED BY:	Nancy Cramer
	Principal Clerk Transcriber
INVESTIGATION NUMBER:	P05010040
TIME STARTED:	N/A
TIME FINISHED:	N/A

JR: O.K. Want to sit in that big, uh chair there. You hot, you want to take off your coat
TS: Sure.
JR: O.K. It get hot in here so you might want to. So my name's Jeanne, and your name' Taylor, right?
TS: Yeah.
JR: What's your last name, Taylor?
TS: Smith.
JR: Smith, O.K. How old are you?
TS: Thirteen.
JR: Thirteen. What school do you go to?

TS: (inaudible).
JR: Yeah? What grade are you in?
TS: Eighth.

* * *

JR: Well, that's not too bad. At least you're not missing classes. Um, Taylor, do you know why you're here today?
TS: Yeah.
JR: O.K. Why do you think you're here?
TS: Cause, uh, my stepdad, what ,what he did and stuff.
JR: O.K. Can you tell me what happened with him?
TS: Like with me?
JR: Yeah.
TS: No.
JR: First, before you go on, what, what's his name?
TS: Dave.
JR: Dave. And is that what you called him?
TS: Yeah.
JR: O.K.
TS: And, um, usually like it was hot, like upstairs so he slept in the basement, and I used to always get ho and stuff so I'd sleep down there. And nothing usually happened, but then I, one, one time we, I woke up, and he was watching TV and it was like porn or whatever. And I didn't really thing much of it cause like I thought I was just dreaming, whatever so I went back to sleep. And them I woke up again. He was like walking around. He was like naked and stuff. And he walked over and turned off the light by the computer.
JR: Em, hmm.

TS: And then he came back, and uh, he was just like, he didn't, he like knelt down to see if I was awake or not.
JR: Em, hmm.

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TS: And he tuned off the TV, and then, uh, he came back and he like, uh rubbed his penis on my face and stuff. And then he want back to the couch, and he did it again.
JR: O.K. Uh, so when he first came over to kneel by you to see if you were awake, were your eyes open?
TS: Well, like I was already about half asleep.
JR: So you saw him but he might have thought you were asleep?
TS: Yeah.
JR: Is that what you think happened? O.K. And so he went to turn off the TV, right?
TS: Yeah, he turned off the TV.
JR: Did you, you saw the porn on the TV? Is that something you saw around the house before, or was that the first time?
TS: O.K. So he shut off the computer, and he came over to you. You said he put his penis in your face. Uh...
TS: Yeah.
JR: ...like where on your face did he put it?
TS: Just like here and stuff.
JR: Was it just like touching you, was it rubbing , or something else?
TS: He was like rubbing it.
JR: Yeah? Could you tell if his penis was hard or anything?

TS: It wasn't
JR: It wasn't? O.K. So anything unusual that you remember about his penis? No?
TS: Un, uh.

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JR: O.K. So after that, I mean, how long did that go on for?
TS: Like a couple of seconds, and then I rolled over. And then he went back to the couch. I didn't think really anything of if cause I just figured, well, that's a dream or something. And then it happened again. Then I went upstairs and told my mom.
JR: So when he was rubbing his penis on your face, um, did he say anything? Did you say anything to him? It was just like...
TS: Yeah.
JR: O.K. And then...
TS: I was kind of shocked.
JR: O.K. And then he went back to the couch. What did he do on the couch?
TS: I couldn't really see cause he was on the couch and there was like a table and then I was on the other side of the table, cause I wasn't really looking, I was facing the other way.
JR: O.K. And then after he came back the second time, what...
TS: He just...
JR: ...did he do?
TS: ...did the same thing.
JR: O.K. Where on your face was his penis touching?
TS: The same place, area.
JR: Did it, did it touch your lips at all?

TS: Un, uh.
JR: Just the side, like your cheek?
TS: Em, hmm.

JR: Did his hands touch you anywhere?
TS: Un, uh.
JR: No? Um, was, what was his penis like the second time he came back?
TS: Same as the first. It wasn't like hard or anything.
JR: O.K. Anything, anything else unusual that you remember? O.K. And the second time did he say anything to you?
TS: No.
JR: Did you say anything to him? O.K. And how long did that last for?
TS: Like five second, maybe.
JR: Em, hmm.
TS: And then he went back to the couch, and I guess he must have put his shorts back on that he was sleeping in because when I walked upstairs, he asked me why I was going up. And then I just said, cause the floor was hurting my back. And then...
JR: What, um, when he first got up off the couch, the first thing you said he didn't have, he was naked.
TS: Yeah.
JR: Did he have any clothes on?
TS: Un, uh.
JR: None at all? So when he came over to you the first time, his penis, he rubbed his penis on your face, did he have any clothes on at that point?
TS: Un, uh.
JR: O.K. Then he went back to the couch, and he came

back a second time. Did he have clothes on then?

TS: Un, uh.
JR: O.K. Um, what were you wearing?
TS: I was wearing just, like I wore like a big shirt and then just pants.
JR: O.K.
TS: Like pajama pants.
JR: O.K.
TS: (inaudible).
JR: Uh, did he ask you to touch any part of him? O.K. And so his penis touched your face, but did any other part of his body contact your body?
TS: Nun, uh.
JR: No? So he put his shorts on. Did he put anything else on after?
TS: Um, not, not that I saw. Cause he just, when, he, he came upstairs and my mom went down there, whatever, and he had shorts on, so I don't know exactly, and that's what he was wearing when he went to bed.
JR: O.K. So he said to you, why are you going upstairs?
TS: And he said, what's wrong? And I said that, just that the floor was hurting my back.
JR: O.K.
TS: That's it.
JR: And when was this?
TS: Like, I think it might have been two or three years ago. I'm not sure.
JR: O.K. You don't remember what grade you were in?
TS: Um, it might have been, it was wither fifth or sixth

grade. I'm not really, I can't remember.

JR: O.K. Fifth or sixth grade. Um, do you know what time of year it was. I know you said it was hot.
TS: Um, it was when he was out of work so I'm not really sure, and I still had school, so, um...
JR: How do, how do you know...
TS: ...(inaudible)...
JR: ...you still had school? What makes you think that?
TS: I don't know. I just remember like that I still had school and stuff.
JR: O.K. So you, you said you went upstairs, and you told your mom?
TS: Yeah.
JR: What did you say happened?
TS: I just pretty much said, I was crying and I just said that Dave was naked and stuff. And then later I told her the rest, cause she was just shocked.
JR: Em, hmm. Um, did your, do you know if your mom, said something to Dave about it?
TS: Um, well, she went down there and talked to him. And he said that I must have been dreaming and stuff. Bat that's, I wasn't, I was upstairs in my own room.
JR: Em, hmm.
TS: So I didn't really hear much.
JR: Now, uh, you're sure that you were awake, right?
TS: Yeah. And like also like when he turned off the TV like my, I had played that Spiro game or whatever, and it turned on to like that part.
JR: Em, hmm.
TS: And tit went to whatever he was watching so...

JR: O.K. So I just want to make sure that you're, you're sure...
TS: Yeah.
JR: ...that it wasn't a dream. Cause I know at first you said you thought it was the first time he came over.
TS: Yeah. Cause I (inaudible), cause like I didn't thing that he would do, do anything like that so I just like, yeah.
JR: But when he came back the second, did that mane you feel like that was...
TS: Yes.
JR: ...it was more real that time? O.K. Um, now are your mom, is your mom and Dave still married?
TS: No.
JR: And where was this when, uh, this thing that hap...
TS: It was here in Flemington.
JR: O.K. Do you know what address you lived at when that happened?
TS: 18 Chelsea Circle.
JR: O.K. So after living there, did you end up going somewhere else with David?
TS: Um, well, he lost his job and then he got one in Minnesota, so we moved there.
JR: Em, hmm.
TS: And then we came back and she got divorced with him out there, and then we came back.
JR: O.K. Um, at any other point, did Dave do anything that made you uncomfortable or made you feel funny, any comments or anything, any way that he touched you before or after that? O.K. Did he ever tell you not to tell anyone, not to talk about it?

TS: He never, well, he never really said anything to me after that. I think he knew, I think during it happened or he didn't really mention it afterwards.
JR: What type of relationship did you have before that? Did you guys get along?
TS: Sort of, but I never really was very fond of him, like, I never really liked him much. That's really about it. He never said like anything like don't tell anybody, or, cause I had already told my mom so.
JR: Em, hmm. Uh, O.K. And do you, have other siblings.
TS: Yeah. My two sisters.
JR: O.K. What are there names?
TS: [M.D.] and [K.D.].
JR: O.K. How old are they?
TS: Uh, 3 and 4.
JR: O.K. Did you ever see Dave touch them at all?
TS: Un, uh.
JR: And, uh, do you know if he ever touched or, that you know of, or saw, touched, or talked to anyone in an inappropriate way?
TS: Well, my friend, he kind of did the same thing, sort of.
JR: Who's that?
TS: Wanda. She, um, it wasn't like exactly the same, but it was, like she was, she came over to babysit...
JR: Em hmm. For you or for...
TS: No, my sisters.
JR: O.K.

TS: And, cause I don't remember where he was going, and he just, they were in the basement again, like they were watching a movie down there, and we have like a lot of weight, his weights and stuff down there.
JR: Em, hmm.
TS: And I guess that's what he was doing. I don't know. And he just like started to undress, and like Wanda just kind of ran out of the house and stuff.
JR: O.K.
TS: I'm not sure of exact details from what, what she told me, but that's about it. Um, do you know around what time that happened? Like what...
TS: That was like a year later.
JR: A year after this, what happened with you.
TS: Yeah.
JR: O.K. So you were still living at Chelsea Circle at that point?
TS: Yeah.
JR: And do you know how old Wanda is now?
TS: She's a year older than me so she's 14.
JR: O.K. Where does Wanda live?
TS: She lived like right behind me, cause we lived in townhouses...
JR: Em, hmm.
TS: ...so there's like right across like the sidewalk.
JR: O.K. Um, all right. I'm gonna go next door for a second. Do you want a glass of water when I come back?
TS: Oh, sure, yeah. I'm like losing my voice.

JR: O.K. I'll get you some water, hold on.
TS: Thanks.

(Detective out of interview room)

JR: Here you go.
TS: Thanks.
JR: Sure. I'm sorry I took so long.
TS: It's all right.
JR: So I know, um, when we were talking about Dave before, you said that you weren't fond of him. Is...
TS: Yeah.
JR: Are there any reasons why you guys, you didn't think fondly of him?
TS: I just, probably just cause he wasn't like my real dad or whatever.
JR: Yeah? Did you guys fight, or just, you just didn't like him...
TS: I just...
JR: ...that much?
TS: ...didn't really like him...
JR: O.K.
TS: ...that much.
JR: Did you guys do things together?
TS: Not really, like not a lot. Like I play soccer, he like, sometimes he would come to my games (inaudible) rarely and stuff.
JR: Em, hmm. What position do you play?

TS: Well, I play like everywhere, but right now I'm mostly like midfield.
JR: That's good. I always played, um, forward growing up. Um, when the incident happened and he, his penis touched your face, did you feel anything? Was it dry, was it we, or something else?
TS: It was, I guess, just like, it wasn't dry, but it

wasn't like wet. It was like just normal, I guess. I don't know, it's hard to explain.
JR: O.K. Did you notice any unusual smells?
TS: Yeah. Like
JR: And what...
TS: ...it smelt just like really weird. And it was, I was crying, and I was like wiping it off my face. It smelt really bad.
JR: How would you de, how would you describe that smell?
TS: Um, it's like undescribable, it's like...
JR: Not anything...
TS: Yeah.
JR: ...you smelled before?
TS: Yeah.
JR: O.K. But did you feel anything sticky, or was it just like skin?
TS: It was just like, not anything sticky.
JR: O.K. Fair enough. Um, did he ask yo to touch any part of his body?
TS: Un, uh.
JR: O.K. And when he, you said you were in the basement.
TS: Em, hmm.

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JR: You slept on the floor on the lot cause your room was hot. Um, so you were lying down. Were, did you have a blan-, a blanket over you?
TS: Well, like...
JR: A sheet?
TS: Usually I just sleep with my legs out and just like it, it grabbed me (inaudible), and I have a sleeping

bag. But I don't, I don't, I wasn't under like any like actual cover.
JR: O.K. So when his penis touched your face, were you lying down or sitting up or...
TS: I was lying down.
JR: You were lying down. And how did he, uh, get his penis down to your face? How was he positioned?
TS: He like bent over and just started doing it, whatever.
JR: O.K. Uh, was he bent over, was he lying next to you and going on his knees or something...
TS: He was like on his knees and like bent over.

JR: Oh, O.K.
TS: (inaudible).
JR: Yeah, I, I understand that. Uh, is there anything else that I didn't ask that you think would be important for me to know?
TS: Not really.
JR: O.K. Do you have any questions for me? No, you sure? You can ask anything you want.
TS: Not really, I don't really have any.
JR: O.K. Um, is everything that you told me here today the truth?

TS: Yeah.

JR: O.K. fair enough. Uh, thank you for coming and talking to me. We're all done. You want to take your water with you when you go back out?

HUNTERDON COUNTY PROSECUTOR'S OFFICE

NAME:	Ronda D.
ADDRESS:	. . .
	Flemington, NJ 08822
TAKEN AT:	Child Advocacy Center
	Main Street
	Flemington, NJ
DATE:	January 25, 2005
QUESTIONS ASKED BY:	Det. Jeanne Rabii
	Hunterdon County
	Prosecutor's Office
WITNESSES PRESENT:	Det. Benedict Donaruma
	Raritan Township
	Police Department
TRANSCRIBED BY:	Nancy Cramer
	Principal Clerk
	Transcriber
INVESTIGATION NUMBER:	P05010040
TIME STARTED:	10:43 A.M.
TIME FINISHED:	11:00 A.M.

This is Detective Jeanne Rabii of the Hunterdon County Prosecutor's Office. Today's date is January 25, 2005. The time is 10:43 a.m. I'm presently located ion the Hunterdon County Child Advocacy Center. Also present in the room is Detective Benny Donamura of the Raritan Township Police Department and Ronda D.

* * *

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JR: O.K. Um, and when did you first learn of this incident?
RD: Um, August 23, 2001. It was approximately 11:30, 12 o'clock at night, My daughter came upstairs from sleeping down in the basement and informed me that, uh, Dave was naked and had rubbed his penis on her face.

* * *

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* * *

JR: O.K. So Taylor came up and told you what happened. Can you tell us again, in detail what exactly she said to you?
RD: Um, I don't remember her exact words, but they were to the effect that he had woken her up, he was naked, and he knelt down and rubbed his penis on her face.
JR: O.K. Um, in the subsequent days after that initial disclosure, did she give you more detail? Um, I guess, yeah, as we talked a little more everyday we got a little more information. And she said that there was pornography on the TV, he was sitting on the couch, and there was pornography on the TV, he got up, shut the TV off, went to the desk to shut the light off, and then he came back to her and kneeled down over her, and that's when he began to rub himself on her face.

* * *

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* * *

RD: Prior to Dave filing for divorce, uh, we knew things were not going well so I had said to her...
JR: That her meaning Taylor?
RD: Taylor, I said to Taylor, that, you know, we were probably going to get a divorce and it's basically because of what had happened with the two of them and I was just confirming that nothing else had happened between her and Dave. And Taylor confirmed that no, nothing else had ever happened again. And, you know, I apologized to her for not doing anything sooner. And I guess just after, you know, finding out all this other information, it all kind of seemed to fit that, you know, it's probably something that really happened. And at that point, she said to me that there was a friend of hers who also said something happened to her.
JR: And who was that?
RD: Um, she was our, a neighbor that lived behind us, Wanda Kemp. And I asked her why, you know, she never told me about Wanda, and Taylor said, you know, Wanda did not want her to tell me, But she said that he had asked her to come over, he asked Wanda to come over and babysit while he did whatever he was doing, I think it was packing up to visit his parents up at the Cape. And apparently he started to remove his clothing and Wanda got uncomfortable and she left the house.
JR: O.K. That's what Taylor relayed...
RD: That's what...
JR: ...to you?
RD: ...Taylor relayed to me.

* * *

* * *

JR: Did you end up calling, um, Wanda's parents?
RD: I called Wanda's stepmother, Jody, and I informed her of what Taylor had told me. And at that point, she had no idea this had happened and she said that she would talk to Wanda to confirm. And I got in touch a couple of days later, and she, in fact, confirmed the story with Wanda that he propositioned her, told her that, you know, they were friends that it was their secret, and Wanda was uncomfortable with that and she left the house.
JR: Did she, did Jody Kemp find, uh, relay what the nature of the proposition was?
RD: She said it was sexual, but she was not specific as to what he asked her to do.

* * *

Statement of Incident Involving Wanda Kemp and David D.

This incident occurred on a weekday afternoon in the summertime. I don't recall how old I was or the date of the incident Dave asked me to come to his house and baby sit his two daughters, When I arrived, the girls were taking a nap and Dave went to take a shower before leaving for his appointment. I don't remember where he was going. I went downstairs in their family room to play vide games while waiting for the girls to finish their nap.

Dave came downstairs with only a towel wrapped around his waist. He sat down on the couch, removed the towel and sat it next to him. He called my name to get my attention; I turned around and saw him sitting naked on the couch. I don't remember if he said anything to me. I immediately told him that I didn't feel comfortable and went upstairs to leave out the backdoor.

He put the towel back on and followed me upstairs. Dave stopped me at the door by putting his hand on my shoulder. I turned around and he told me something like - this is our secret, don't tell anyone or he would get in trouble. I think that I remember him asking at that point if I would still stay and watch the girls. I told him no and went across the courtyard to the back door of my house.

He never touched me inappropriately and I never gave him the chance to speak to me about the incident again. I made sure that I was never lect

alone with him and only told Taylor Smith about what had happened.

This is a complete description of the incident to the best of my recollection.

Signed:

S/ Wanda Kemp
Wanda J. Kemp
March 6, 2008

WRONKO & LOEWEN
Attorneys at Law
38 North Gaston Avenue
Somerville, NJ 08876
908-704-9200

December 19, 2006

The Honorable Peter A. Buchsbamn, J.S.C.
Hunterdon County Superior Court
Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822

RE: New Jersey DYFS v. David D., et al
Docket Ne. FN-10-00026-05

Dear Judge Buchsbaum:

This matter is before Your Honor as a result of an Opinion of the Superior Court of New Jersey, Appellate Division, which reversed the trial court's September 23, 2005, Ending of abuse and neglect entered against David D. because of alleged contact with Taylor Smith. The Appellate Division also reversed a Dispositional Order issued on September 23, 2005, as well by the trial court in which Taylor Smith as well as [K.D.] and [M.D.] were maintained under the care and supervision of the Division of Youth and Family Services. Pursuant to that Order the trial court only allowed David D. supervised visitation with Kaleigh and Mackenzie.

* * *

If this court was required to address the issue of potential restraints regarding the two natural children [K.D.] and {M.D.], it would be requested that this court, if DYFS refused to agree that Mr. D. be allowed to take a stipulated polygraph test administered either by the Hunterdon County Prosecutor's Office or the New Jersey State Police, order one to assist this court in deciding whether or not pre-hearing restraints should be imposed. In that regard, Mr. D. has requested that the other parties in this matter agree that he be allowed to take a stipulated polygraph with the results thereof; whether favorable or unfavorable to him, being admissible in this proceeding. Mr. D. continues to assert his innocense and is willing to take this step to give this court as much information as possible in determining the pre-hearing restraints on his visitation with his children. Mr. D., based solely on the allegation of his step-daughter of improper sexual contact five years ago, who the defense was not even able to question or view her testifying in the hearing previously held, has been denied access to his minor children with the exception of limited visitation while under DYFS supervision.
supervision.

Respectfully submitted,
S/ James R. Wronko

[Da55, 59]

STATE OF NEW JERSEY — DEPARTMENT OF HUMAN SERVICES - OFFICE OF CHILDREN SERVICES

CHILD PROTECTIVE SERVICES REPORT

Report Name	Report Number
Ronda D.	10006909

Date of Report	Time of Report
February 20, 2005	06:32 P.M.

Worker
Trashaun Andrews

* * *

ALLEGED CHILD ABUSE/NEGLECT AND CIRCUMSTANCES

Pauline Dessertine of Kuris Counseling Center reports that Taylor Smith age 12 disclosed that her step-father (name unknown) has sexually abused her on 1/18/2005. Taylor disclosed that her step-father would take his penis and rub it against her face and on her lips. Taylor also disclosed that this was done twice before. The date of the last incident was [ ]/20/2004. It is further reported that the unknown male is rumored to be sexually abusing the families' babysitter. Pauline Dessertine also reported that the unknown male does not live in the home.

* * *

ASSIGNMENT INFORMATION

Assigned to: Matthew Hengst 10 a.m. on 1-21-05
[Da74 to 77]

COUNTY OF HUNTERDON
INVESTIGATION REPORT
CASE ID P05010040

* * *

Crime date: 8-23-01/8-24-01 Victim's Name: Taylor Smith

* * *

Statute:	Crime Type:	Victim's Name:
2C:14-2	Sexual Assault	Smith, Taylor

Address:

. . .

Flemington, NJ

Crime date: 8-23-01/8-24-01

NARRATIVE

FRIDAY JANUARY 28, 2005

On this date I spoke with an ED KEMP (phone ...) And requested that he bring his daughter WANDA to the Prosecutor's Office to be interviewed. He expressed concern over doing so because he felt that his ex-wife would use it against him.. He stated it was a terrible custody battle and he did not want to jeopardize his custody. MR. KEMP stated that he would have his wife, JODY call me. I received a call from JODY KEMP. She stated that they would not bringing WANDA in to be interviewed.

* * *

MONDAY, APRIL 10, 2005

On this date, I reviewed a polygraph examination report provided to the Prosecutor's Office by JAMES WRONKO. The reports states that DAVID D. was examined by NICHOLAS SUSALIS on March 21, 2005. I am turning the investigative file over to DETECTIVE SERGEANT ROY AYCOCK so he can review the file and evaluate the polygraph examination results.

S/Det. Jeanne M. Rabii 04/11/2005

[Da90, 93]

COUNTY OF HUNTERDON
INVESTIGATION REPORT
CASE ID P05010040

* * *

Crime date: 8-23-01/8-24-01 Victim's Name:
Taylor Smith

* * *

Statute:	Crime Type:	Victim's Name:
2C:14-2	Sexual Assault	Smith, Taylor

Address:
. . .
Flemington, NJ

Crime date: 8-23-01/8-24-01

NARRATIVE

MAY 25, 2005, WEDNESDAY:

On the above date, I briefed Det. Jeanne Rabii on my review of the polygraph examination of David D.. Conducted by N. Susalis and Associates, Inc. I previously had discussed my review with A.P. Solaru and I advised Det. Rabii of that as well.

I had previously advised A.P. Solari that upon reviewing the polygraph examination conducted by Nick Susalis I could find nothing to disagree with his interpretation of the results of this examination, I did however take issue with his pertinent crime questions.

Mr. Susalis explained that he did not have the victim's statement and formulated the questions he used based on the information he learned from the suspect, after asking the suspect what he was accused of. Mr. Susalis continued that he tried to cover all possible issues when he formulated the questions. I advised A.P. Solari that this might be acceptable but was not the best method. In fact comparing the victim's statement to the questions used the suspect could truthfully answer three out of the four questions even if he had committed all of the offenses in the victim's statement. A.P. Solari indicated that she would discuss the polygraph examination with Mr. Wronko, the defense counsel.

S/ G. Roy Aycock Report date: 05/25/2005

[Da94]

ASSOCIATES IN PSYCHOLOGICAL SERVICES, P.A.

Psychological Report

Name: David D.
Age: 42 years

Date(s) of Examination: 7/18/05

Examiner: Philip H. Witt, PhD.

Reasons for referral:
Mr. D. was referred for a psychological evaluation by his attorney, James Wronko, Esq., after allegations were raised that he had placed his penis against his stepdaughter's face in January 2001.

Sources of Information:

* * *

A letter from the Hunterdon County Prosecutor's Office Dated July 13, 2005 indicates no criminal complaint will be file against Mr. D., although the file will remain open in case additional evidence develops. A report from Nicholas Susalis, a polygraph operator, indicates that he conducted a polygraph examination of Mr. D. on April 1, 2005. Mr. D. was being truthful in denying the allegations against him regarding the incident with Taylor.

* * *

S/ Philip H. Witt, Ph.D
Diplomate in Forensic Psychology, AFPP
Date: 7/18/05 [Da140]

JAY D. KURIS, M.D.
AND ASSOCIATES
28 MINE STREET
FLEMINGTON, NEW JERSEY 08822

TELEPHONE 908-788-5551
FAX 908-788-0019

Mr. Engert Hewitt, Caseworker
New Jersey Division of Youth and Family Services
Hunterdon County Office
Park Avenue
Flemington, New Jersey, 08822

Dear Mr. Hewitt,

I am writing in response to your request on February 4, 2008 to reevaluate the child Taylor Smith for her ability to testify in the upcoming legal action on March 10, 2008.

I have met with Taylor only once. A second appointment was cancelled. At that time we discussed her feelings about the hearing. I found Taylor to be a rather mature and stable adolescent. She feels, and I agree that she is able to testify in the courtroom. She would like Mr. David D. to bot be present and I concur that his presence could be intimidating. There is concern on my and her part that cross examination might be hostile and so I recommend that those questions be asked by the judge if possible.

If I can be of any further assistance please feel free to contact me.

Sincerely,

s/Pauline L. Dessertine

Pauline L. Dessertine, R.N., M.S.N, Ed.S.

[Da313]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - FAMILY PART
HUNTERDON COUNTY
DOCKET NO. FN-10-26-05

NEW JERSEY DIVISION OF YOUTH
AND FAMILY SERVICES
Plaintiff,

v. CIVIL ACTION

DAVID D.
RHONDA CICHIELO
STEVEN SMITH

FILED
SUPERIOR COURT OF NJ
APR 17 2008
Chancery Division
Hunterdon County

DISPOSITIONAL ORDER

IN THE MATTER OF: (Fact-finding)

Taylor Smith
[K.D.]
[M.D.]

This matter having been brought before the Court on April 17, 2008 by the Division of Youth and Family Services (the Division), Deputy Attorney General Andrea C. D'Aleo appearing, Law Guardian Amy Vasquez appearing, David D. appearing, represented by James Wronko ...

The court, having considered the arguments and representations of counsel and testimony, if any...

Following the fact-finding, the court hereby determines by:

a preponderance of evidence

that the defendant abused the children in that he committed a sexual abuse act upon the minor child, Taylor, when he was her step-father and had a supervisory role over her. Pursuant to N.J.S.A. 9:6-8.46(a), the state has demonstrated that defendant poses a risk of sexual harm to the minors K.D. and M.D. The testimony of Dr. Witt also established the same risk of harm to K.D. and M.D.

Mr. D. shall continue to have supervised parenting time with [K.D.] and {M.D.] and supervision shall be done by DYFS or DYFS designees at DYFS office (Paternal Grandparents shall not be permitted to supervise visitation) as previously court ordered . Mr. D. shall engage in individual counseling and have input as to appropriateness of counselor. DYFS shall continue to maintain care and supervision of children. Mr. D. is restrained from contact with Taylor Smith and Wanda Kemp. Taylor Smith shall be dismissed from litigation.

S/ Hon. Ann R. Bartlett, J.S.C.

HON. ANN. R. BARTLETT, J.S.C.

N.J. Stat.Ann. 2A:84A-32.4

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or child abuse, or in any action alleging an abused or neglected child under P.L.1974, c. 119 (C.9:6-8.21 et seq.), the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a witness on closed circuit television at the trial, out of the view of the jury, defendant, or spectators upon making findings as provided in subsection b. of this section.

b. An order under this section may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order shall be specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact of the presence of each.

c. A motion seeking closed circuit testimony under subsection a. of this section may be filed by:

(1) The victim or witness or the victim's or witness's attorney, parent or legal guardian;

(2) The prosecutor;

(3) The defendant or the defendant's counsel; or

(4) The trial judge on the judge's own motion.

d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.

e. If testimony is taken on closed circuit television pursuant to the provisions of this act, a stenographic recording of that testimony shall also be required. A typewritten transcript of that testimony shall be included in the record on appeal. The closed circuit testimony itself shall not constitute part of the record on appeal except on motion for good cause shown.

L.1985, c. 126, § 1, eff. April 11, 1985.

(3)

No. 09-805

In The

Supreme Court of the United States

David D.,

Petitioner,

v

New Jersey Division of Youth and Family Services
***ex rel* M.D. and K.D., minors,**

Respondents.

On Petition For Writ of Certiorari
To The Superior Court of New Jersey – Appellate Division

BRIEF OF RESPONDENTS

NOEL C. DEVLIN
Counsel of Record

YVONNE SMITH SEGARS, Public Defender

Office of the Public Defender
Office of Law Guardian
840 Bear Tavern Road, Suite 200
Ewing, New Jersey 08628
(609) 530-3623
Counsel for Respondents M.D. & K.D.

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STATEMENT OF CASE

T S , date of birth August 5, 1991, and the half-sister of Respondents M D and K D , told her therapist in January 2005 that she had been sexually assaulted by Petitioner, her then step-father, in 2001 The therapist contacted the New Jersey Division of Youth and Family Services (hereinafter "the Division"), which is New Jersey's child welfare agency, who then investigated along with local law enforcement The Division then filed a complaint to gain care and supervision of T S , M D and K D , the relief requested was granted Physical custody of the children remained with their mother, R C , who had separated from Petitioner approximately one month earlier

The incident which gave rise to the Division's involvement occurred on August 23, 2001 On that date, late in the evening, T S was sleeping in the basement of the family home, since the basement was cooler than her bedroom Petitioner was in the basement also, watching an adult-themed program on television While they were in the basement, Petitioner committed an act of sexual abuse by rubbing his penis on T S 's face

Moments later T S related the incident to R C , her mother R C confronted Petitioner, but Petitioner denied that the incident occurred R C decided to take no further action

Three years later Petitioner and R C divorced During this time, T S saw a therapist After the divorce was finalized, T S revealed the incident of abuse during a therapy session The therapist then contacted the Division The local prosecutor's office conducted an investigation but decided not to pursue criminal charges

Petitioner was permitted to have contact with his daughters, albeit supervised The bench trial under review commenced on March 11, 2008 [1] After five days of testimony, the trial court, with the trial judge sitting as the fact finder, ruled that Petitioner had committed the alleged act of sexual abuse upon T S , along with a 2003 incident in which Petitioner exposed himself to another minor, W K , who was T S 's friend The judge further found that M D and K D , Petitioner's daughters, were in need of protection from Petitioner This decision was affirmed by the Appellate Division of the Superior Court on June 1, 2009, discretionary review by the New Jersey Supreme Court was sought by Petitioner and denied on October 15, 2009

[1] A prior trial was reversed on grounds unrelated to the instant Petition

During the trial, the court took testimony from T S , age sixteen at the time of trial, and W K , age seventeen The trial court took their testimony outside of the presence of defendant The judge asked questions which had been posed by counsel and counsel were able to view the questioning Prior to trial, T S 's therapist had submitted a letter indicating T S 's preference for this procedure, as opposed to T S taking the witness stand with cross-examination The testimony was transcribed and preserved in the record Pursuant to *N J Stat Ann* 9 6-8 11, the Division was required to place Petitioner's name in the state's central child abuse registry of perpetrators

REASONS FOR DENYING THE WRIT

I Child Welfare Litigation is a Civil Proceeding, Nevertheless, States Which Have Addressed The Issue of Balancing a Parent's Interest in Confronting Child Witnesses with a Court's *Parens Patriae* Duty to Protect Children from Undue Trauma Have Resolved the Issue Consistent with this Court's Holding in *Maryland v Craig*, 497 *U S* 836, 110 *S Ct* 3157, 111 *L Ed 2d* 666 (1990)

The Petition at bar does not raise a cognizable federal question as no Constitutional right of Petitioner was violated during the child welfare litigation below Although a defendant parent in a child welfare action may, if found to have committed an act of abuse of neglect, be subject to a disposition which restricts parenting time in

order to protect the child,[2] such proceedings are civil in nature At times, children are called to testify and are permitted to do so in an alternative format designed to reduce the trauma of giving testimony regarding emotionally sensitive events Courts, however, in recognizing the significant interests at stake for defendant parents, have implemented procedures for receiving testimony from children that recognizes similar concerns as this Court did in *Craig* and ensures that defendant parents have a meaningful opportunity to rebut the child's testimony Petitioner's claim of a denial of the protections of the Due Process Clause, namely the Sixth Amendment's Right of Confrontation, is without merit

This Court has legitimized the priority states have given to protecting children from harm, even while testifying In general, family courts are called upon to make determinations of parental fitness based on the unique facts each case presents This Court noted that "[t]he judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review" *Palmore v Sidoti*, 466 *U S* 429, 431, 104 *S Ct* 1879, 1882, 80 *L Ed 2d* 421,

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[2] As Petitioner notes, because the trial court made a finding that Petitioner had committed an act of child abuse, the Division was required to keep Petitioner's name in the state's central child abuse registry *N J Stat Ann* 9 6-8 11

425 (1984), *In re Burrus*, 136 *U S* 586, 10 *S Ct* 850, 34 *L Ed* 500 (1890) The *Palmore* decision also recognized that the State "has a duty of the highest order to protect the interests of minor children, particularly those of tender years " *Id* , 466 *U S* at 433, 104 *S Ct* at 1882, 80 *L Ed 2d* at 425 This recognized the public interest in courts making custody determinations that are in the best interests of children and in implementing procedures to receive their testimony that safeguards a victimized child from emotional trauma that an adult in a similar situation would likely not experience

This Court has held that Constitutional protections provided to defendants in criminal matters are not applicable in a civil proceeding This is especially true when the divergence between civil and criminal procedures and defenses available to criminal defendants furthers public policy, such as shielding children from undue harm that would likely be caused by participation in a trial

Specifically in the context of a family court matter involving a government child welfare agency, this Court in *Baltimore City Department of Social Services v Bouknight*, 493 *U S* 549, 110 *S Ct* 900, 107 *L Ed 2d* 992 (1990) ruled that the *Fifth Amendment* privilege against self-incrimination may not be invoked by a defendant when a

government entity, in the context of non-criminal litigation, needs information possessed by the defendant in order to further the mission of the agency in protecting and providing services for children. In *Bouknight*, the defendant mother of a child under the jurisdiction of the local child welfare agency was imprisoned on a charge of civil contempt for refusing to reveal the whereabouts of the child to the agency. In holding that the defendant could not invoke the *Fifth Amendment's* protection against self-incrimination, the Court ruled that "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." *Id.* 493 *U.S.* at 557, 110 *S.Ct.* 906, 107 *L.Ed.2d* 1001 (citing *California v. Byers*, 402 *U.S.* 422, 91 *S.Ct.* 1535, 29 *L.Ed.2d* 9 (1971)).

Likewise, this Court found a distinction between civil child welfare litigation, involving a government agency charged with providing child welfare services, and a criminal action in holding that the *Due Process Clause* does not provide a guarantee of counsel to defendant parents, even in actions brought to forever extinguish parental rights. *Lassiter v. Department of Social Services of Durham County*, 452 *U.S.* 18, 101 *S.Ct.* 2153, 68 *L.Ed.2d* 640 (1981). The Court

found that due process is a concept without "fixed content", in determining whether the requirement of due process was satisfied in a particular case requires an inquiry into whether "fundamental fairness" was achieved *Id* 452 *U S* at 24-25, 101 *S Ct* at 2158, 68 *L Ed 2d* at 649 The Court noted the differences between criminal prosecutions in which a defendant would be in jeopardy of losing personal liberty with that faced by the defendant in *Lassiter*, namely an action in the family court to determine the best placement for the child A criminal action is strictly adversarial, child welfare litigation has the ultimate goal not of punishing a parent, but rather determining the best interests of the additional party uniquely present in these cases, the child As Chief Justice Burger wrote, "[t]he purpose of the termination proceeding at issue here was not 'punitive' (citations omitted) [o]n the contrary, its purpose was *protective* of the child's best interests" *Id* 452 *U S* at 34, 101 *S Ct* at 2163, 68 *L Ed 2d* at 654 (Burger, C J concurring)

This Court's distinction between civil actions involving child welfare and criminal prosecutions for child abuse is also exemplified in *Idaho v Wright*, 497 *U S* 805, 110 *S Ct* 3139, 111 *L Ed 2d* 638 (1990), in which the Court held that the criminal defendant's rights under the *Confrontation Clause* were violated In *Wright*, a defendant mother

was on trial for lewd conduct against her daughter in which the daughter was found by the trial judge to be incapable of testifying before the jury, yet a pediatrician was permitted to testify as to a statement the child had given to him detailing the defendant mother's conduct First, the Court criticized the pediatrician's interview style since the questions and answers were not recorded or otherwise preserved and leading questions were used *Id* , 497 *U S* at 82-13, 110 *S Ct* at 3146, 111 *L Ed 2d* at 650 The Court then recognized, however, that in some circumstances a hearsay statement may be admissible against a criminal defendant even though it violates the literal terms of the Sixth Amendment and that the "unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made " *Id* 497 *U S* at 822, 110 *S Ct* at 3150, 111 *L Ed 2d* at 657

This Court enunciated a three-element test for determining whether procedural due process has been satisfied *Mathews v Eldridge*, 424 *U S* 319, 96 *S Ct* 893, 47 *L Ed 2d* 18 (1976) The three elements used in deciding whether the requirement of due process was met include the private interest that will be affected by the government action, the risk of an erroneous decision being reached

by the procedures in question and the governmental interest in either maintaining the procedure or using a substitute procedure *Id* 424 *U S* at 335, 96 *S Ct* at 903, 47 *L Ed 2d* at 33 The Court emphasized that these criteria must be applied in a flexible manner *Id*

In a civil proceeding for determining whether a child has been abused, and, if so, to impose restraints for the protection of the child, a trial court allowing a child witness to testify in camera rather than on the witness stand satisfies the *Mathews* standard of due process, even if the testimony is taken outside of the presence of the defendant and the child is questioned by the judge, rather than counsel The first element under the *Mathews* test for determining if due process was afforded is, undoubtedly, favorable to the parent defendant in such actions Parents have an interest in raising their children free of government restrictions which is of Constitutional dimension, thus restrictions can only be permitted if found to be necessary for the safety of the children *Stanley v Illinois*, 405 *U S* 645, 92 *S Ct* 1208, 31 *L Ed 2d* 551 (1972)

The second and third *Mathews* elements support the assertion that a trial court allowing alternative procedures for receiving the testimony of children does not run afoul of the *Due Process* clause The

risk that such procedures will produce an erroneous finding that restricts a defendant parent's right to custody is minimal State procedures, in general, require that the court find that the child witness understands the difference between a truth and lie and the strict requirement to always tell the truth when answering questions Credibility of the child witness, like that of any other witness in a proceeding of this type, is determined by the fact finder The questions asked by the judge are largely generated by the attorneys, thus the defendant has an opportunity to address any areas which could expose inconsistencies in the account of the witness Given these key aspects of the manner in which testimony of the child witness is elicited, there is substantial compliance with the essence of the *Confrontation Clause*, ensuring that defendant is afforded due process

In relation to the third element, the court, through its inherent *parens patriae* responsibilities, has a compelling interest in maintaining the practice that victims of child abuse are permitted to testify in private in appropriate circumstances Giving testimony in this manner lessens the emotional trauma already felt by the victims in child abuse situations It is axiomatic that, in a proceeding to determine whether

an act of child abuse occurred, and, if so, what restraints are necessary, the court seeks not to cause additional harm. While the child witness is not totally immunized from the stresses of litigation, the court may properly seek to minimize the harm so long as the integrity of the truth-seeking aspect of the proceeding is preserved. Under the totality of the *Mathews* test, the practice of taking a child victim's testimony in private does not increase the likelihood of an erroneous finding and fulfills the court's responsibility to protect children in these proceedings from unnecessary harm.

The survey of cases from various states raised by Petitioner demonstrate the care state courts have taken to provide an acceptable level of due process to parents while maintaining an effective system for handling child welfare matters. In the Massachusetts matter cited by Petitioner, *Adoption of Mary*, 414 Mass. 705, 710, 610 *N.E.2d* 898, 902 (1993), the trial court was permitted to consider hearsay evidence, in the form of an investigator's report, because the defendant parent was given an ample opportunity to rebut the evidence contained in the report. In Maine, a child's prior recorded statement alleging abuse was permitted to be treated as testimony at trial because the trial court found that the three element

test of *Mathews* was met and, therefore, their admission did not offend the *Confrontation Clause*. *In re Charles Jason R.*, 572 A.2d 1080 (Me. 1990).

In proceedings with similar issues to the case at bar, the intermediate appellate court in New York and the Ohio Supreme Court held that the trial court did not commit an error in allowing the child victims of abuse and neglect to testify outside of the presence of defendants because counsel was able to question the children. *In re Heather S.*, 19 A.D.3d 606, 797 N.Y.S.2d 136 (N.Y.A.D. 2005); *Reynolds v. Ross Cty. Children's Services Agency*, 5 Ohio St.3d 27, 448 N.E.2d 816 (1993). An almost identical procedure to the one used by the trial court in the case at bar was found by the Rhode Island Supreme Court to satisfy due process challenges. *In re James A.*, 505 A.2d 1386, (R.I. 1986). In *James*, a trial judge took testimony from a child in chambers with only counsel present and no cross-examination by counsel; when the child cried during testimony, the courtroom was cleared and only the judge and stenographer remained. *Id.* In addressing the challenge based on the *Confrontation Clause*, the court found that "no constitutional right to confrontation or cross-examination attaches in noncriminal proceedings" and that the

procedure invoked struck a balance between not causing the child emotional harm and allowing the defendant parent adequate means to rebut the allegations *Id* at 1391

California's state courts have held that fundamental fairness under the equal protection clause is not violated when a hearsay statement of a child is admitted in a child welfare proceeding without the child being cross-examined if the statement has "indicia of reliability", there is corroborating evidence and the defendant has adequate notice in order to rebut that evidence *In re Apnl C* , 131 *Cal App 4th 599, 609, 31 Cal Rptr 3d 804, 809-10* (Cal App 2005) The Kansas Supreme Court noted that "[c]onfrontation and cross-examination are not rights universally applicable to civil proceedings" and that the trial court did not err in basing a decision that a child was abused based on a prior interview of the child by social workers, despite the child being "available" to testify *In the Interest of J D C* , *284 Kan 155, 168, 159 P 3d 974, 983 (2007)*

States which have addressed the issue of taking a minor's testimony outside of the defendant's presence, cited above, have done so while acknowledging and respecting the *Confrontation Clause* While the states have not adopted uniform procedures, each

has used the Sixth Amendment as a touchstone to begin their analysis Thus, the varied standards among the states that Petitioner suggests erode the protections of the *Sixth Amendment* do not exist

This Court, in *Craig*, has held that the Constitution does not guarantee a defendant the right to face-to-face confrontation of a child witness Recognizing that competing interests are at stake between a defendant and the courts in seeking to protect a child victim from emotional harm, so long as a defendant is given a meaningful opportunity to challenge the evidence presented by the child welfare agency, the essence of the *Confrontation Clause* is satisfied In the proceedings under review, Petitioner was afforded due process and had a meaningful opportunity to rebut the allegations against him

II The Manner in Which the Testimony of T S and W K Was Taken Did Not Violate Petitioner's Guarantee of Procedural Due Process

The trial court crafted a procedure for taking the testimony of T S and W K that was in accord with Petitioner's due process rights and compliant with this Court's decision in *Craig* The trial court took care to ensure that Petitioner had an opportunity to rebut the allegations for which he was on trial The trial court achieved a fair

balance between Petitioner ability to defend the allegations and the court's *parens patriae* responsibility to ensure that undue trauma did not come to the minors from their giving testimony

Petitioner asks this Court to assume that the outcome of the proceeding would have been more favorable to him had Petitioner himself, in addition to counsel, been present while the minors testified Petitioner does not set forth any lines of questioning which he would have raised on cross-examination Therefore, an inference can be drawn that the examination of the children by the trial judge, rather than counsel, is of no significance A fair reading of the trial judge's opinion indicates that the case turned on questions of credibility, particularly Petitioner's testimony which was found to be lacking in credibility

Petitioner states that the manner in which this testimony was taken at his trial is indicative of European courts, in which a judge can serve as the chief inquisitor The trial here is distinguishable in that the questions used by the trial judge in examining the child witnesses were based on areas of inquiry supplied by counsel The trial judge simply served as the conduit for receiving testimony in order to alleviate the

stress on the minors being questioned Thus, the examination of the witnesses was driven by counsel, not the trial judge

In conclusion, the Petitioner was given a substantial opportunity to challenge the testimony of T S and W K The case was decided on credibility determinations, Petitioner testified, but was found to lack credibility Under this Court's holding in *Craig* and the procedures adopted by various state courts discussed above, Petitioner was not deprived of due process at trial

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully Submitted

Date Feb 3, 2010

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No. 09-805

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In The
Supreme Court of the United States

D.D.,

Petitioner,

v.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES ex rel., M.D. and K.D.,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES

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QUESTION PRESENTED

The New Jersey Division of Youth and Family Services sought to enjoin the petitioner from unsupervised contact with his daughters based on his sexual abuse of his ten-year-old stepdaughter and her twelve-year-old friend. The alleged victims were sixteen and seventeen at the time they testified. In accordance with New Jersey Court Rule 5:12-4(b), the trial judge took the alleged victims' testimony in the presence of counsel, but outside the presence of the petitioner. Unlimited rounds of questions were proposed by counsel, with consultation with their clients between rounds. The question presented by this case is whether this procedure violated the petitioner's rights under the Due Process Clause.

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STATEMENT OF THE CASE

David D. attempts to portray this matter as one in which allegations of sexual abuse were contrived in order to gain advantage in a matrimonial action. However, on August 21, 2001, years before the marriage between David D. and Ronda C. deteriorated, David D. concedes he had an excellent relationship with his step-daughter, Taylor S. (5T71-9 to 5T72-3).[1] It is undisputed that, on that date at approximately 10 or 11 p.m., David D. was laying on the couch in the finished basement of their home in New Jersey and Taylor went to sleep in a sleeping bag on the floor of that room. (5T20-2 to 9). All parties also agree that, at approximately 12:00 a.m., Taylor got up, went upstairs to the bedroom where her mother was sleeping, and told her that David D., while naked, had rubbed his penis on her face. (2T57-17 to 2T58-11). Taylor's mother, Ms. C., testified that:

> Approximately, I'm going to say twelve o'clock, [Taylor] came upstairs and I thought

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[1] Pet. App. refers to the appendix filed by the petitioner.

Da refers to the trial exhibits contained in the appendix filed by petitioner David D. in connection with his appeal to the New Jersey Superior Court, Appellate Division.

Transcript cites are to the eight volumes of the six day fact-finding hearing conducted before the Honorable Ann R. Bartlett, J.S.C. March 11 to April 17, 2008. Transcripts of the prior (2005) fact-finding hearing which was held before a different judge and which was reversed by the New Jersey Superior Court, Appellate Division based on lack of jurisdiction (Pet. App. 39a) were available to counsel for use in the 2008 fact-finding hearing.

> I heard her crying in the bathroom. And she came into the room and said to me that something had happened in the basement with Dave. And I immediately jumped up and I said 'what happened?' And she told me he had rubbed his penis on her face . . . She was very upset. She was practically jumping out of her skin. Every time the floor creaked, I guess she thought Dave was coming upstairs, and she was afraid that he would hear her telling me what she had to tell me.

[Pet. App. 88a-89a].

After confronting David D., Ms. C. elected to do nothing about the incident at that time. She testified that she did not report the incident because she was not working, she was five months pregnant with her third child, and she was afraid of what would happen. She testified that David D. begged her to believe him, and that she did not want to believe that her husband was capable of such an act. (2T63-18 to 25). As Ms. C. acknowledged when she stipulated in lieu of fact-finding, her failure to take action to protect her children constituted neglect. (2T64-1 to 10).

Subsequently the marriage between Ms. C. and David D. deteriorated, reportedly, in part, due to David D.'s involvement with pornography. (2T67-2 to 6; 1T80-1 to 1T81-12; 2T62-20 to 2T63-14). David D., who had an upper management position at a pharmaceutical company, was caught three times during his nine-year career there with pornography on his computer. (1T120-12 to 1T121-8; 1T139-17 to 1T140-12;

1T121-12 to 1T123-9). The third time involved the downloading of twenty-two gigabytes of pornographic material – over 400,000 files (1T130-24 to 1T131-1) – and its discovery in January 2003 led to David D.'s termination of employment. Contrary to David D.'s assertion that the material was e-mailed to him, David D. admitted at trial that he had downloaded this material over the course of several months. (Pet. App. 135a). It was later revealed that the pornography he downloaded consisted, at least in part, of child pornography. The files were encrypted and could not be opened, although their titles could be read. Eight hundred and twenty-seven of them were conclusively identified as coming from a commercial child pornography website known as "Lolita's Kingdom." They were matched by file size and group number to the files on the website, which were downloaded and testified to by a special agent from the U.S. Immigration and Customs Enforcement Child Exploitation Unit. (1T38-4 to 1T51-19). The photos of underage girls David D. downloaded were obtained and entered in evidence. In fact, 100% of the files that could be identified consisted of nude pictures of underage females. Most of the other files were titled by number or the name of a female, but many had titles such as "Most Erotic Teens," "Perverse Uncle," "Schoolgirl," "Sunny Teen," "Prized Teens," "Young Blondie Tits," "Young Sisters," "Teen Cambodian Girls Having Fun," "Incest" (Da226-231, 1T129-5 to 9, 1T160-10 to 1T161-4), "Little Girls" (Da278, Id.), "Very Young," "Wicked School Girls" and "Young." (Da278-283, 1T129-5 to 9, 1T160-10 to 1T161-4).

In the fall of 2004, Ms. C. revealed to Taylor that she and David D. were going to get divorced. (2T76-13 to 24; 3T39-16 to 22). Ms. C. apologized to her daughter for her inaction after the August 2001 incident, and asked if anything else had happened. Ms. C. testified that Taylor denied that anything else happened to her but stated that her friend Wanda K. had revealed something like "he took his shirt off and propositioned her." (2T76-13 to 2T77-12). In fact, Wanda K. had revealed to Taylor S. that David D. undressed in front of Wanda K. (3T16-23 to 3T17-1). Ms. C. called Ms. K., Wanda K.'s stepmother, when she learned of the incident; Ms. K. then questioned Wanda K., who described the incident. (2T23-11 to 2T23-23; 2T12-11 to 2T13-9). Ms. K. testified she responded by speaking with professionals and linking Wanda K. with a therapist. (2T13-11 to 15).

The allegations of David D.'s abuse of both Taylor S. and Wanda K. were brought to the attention of the New Jersey Division of Youth and Family Services ("Division") on January 20, 2005, after Ms. C. and Taylor S. had returned to New Jersey from Minnesota where the family had moved in April 2004. Taylor S. disclosed her abuse to her therapist, Pauline Dessertine, on January 18, 2005. (1T73-16 to 1T74-14). After investigation, the Division filed a complaint and obtained an injunction against David D.'s unsupervised contact with his daughters, then ages three and four. Wanda K.'s parents refused to have her interviewed by the Hunterdon County Prosecutor's Office. (2T15-8 to 2T16-3).

Significantly, and contrary to David D's characterization of Taylor's attitude toward him in his various appellate briefs, David D. conceded in his testimony that, up until the August 21, 2001 incident, he had a very good relationship with Taylor S., and that, even after that time, although he contends the relationship deteriorated, his only articulated concerns dealt with arguments over Taylor keeping her room cleaned up and doing her homework. (5T71-9 to 5T71-20).[2] Similarly, David D. testified that he had a good relationship with Wanda K., and did not state any reason why Wanda might accuse him of undressing in front of her. (5T72-1 to 13). Wanda K. initially disclosed the incident with David D. to Taylor long before the marriage between David D. and Ronda C. ended. (3T15-9 to 22; 7T12 to 17; Pet. App. 180a).

Taylor S. and Wanda K. both testified at trial, utilizing a procedure that was explicitly prescribed by

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[2] Mr. D.'s contention that ten-year-old Taylor dreamed that he leaned over her and touched her face with his penis is unsupported in the record. While he claims that he and his then wife "discussed" whether Taylor was dreaming, the record reflects only an insistence by David D. that Taylor had dreamed the event. (2T92-11 to 15). The dreams Taylor did have, which Mr. D. characterizes as "disturbing" and "recurring," were never described as disturbing or upsetting in any way, were not sexual, and occurred when Taylor was three and four years old. (3T38-1 to 10).

the New Jersey Superior Court, Appellate Division in its January 17, 2008 opinion:[3]

> When the *de novo* fact-finding hearing is conducted, any proofs adduced from [Taylor S.], who is now the age of sixteen, shall be taken either in open court or, if the judge elects in his discretion to have her re-interviewed in chambers, *see* R.5:12-4(b), all counsel shall have the right to either be present or to observe the child's responses contemporaneously through closed circuit television or a comparable video link, in accordance with N.J.S.A. 2A:84A-32.4. Consistent with our prior opinion, all counsel shall be afforded the opportunity to submit to the court additional questions to pose to [Taylor S.] after the initial portion of such an interview.

[Pet. App. 44a-45a].

The trial court decided to employ these procedures. All counsel were present when Taylor S. and Wanda K. testified, and rounds of follow-up questions (subsequent to consultation with their respective

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[3] The case had previously been tried in the Fall of 2005, at which time a finding of abuse had been made. (Pet. App. 7a). That finding was reversed by the Superior Court of New Jersey, Appellate Division, which found that Minnesota, rather than New Jersey, had jurisdiction. (Pet. App. 39a). Minnesota subsequently determined it was an improper and inconvenient forum, as the children resided in New Jersey and the alleged abuse occurred in New Jersey. (Pet. App. 40a).

clients) were permitted until no counsel proposed additional questions. *See*, 1T12-1 to 1T15-1; 2T9-17 to 25; 3T20-5 to 3T32-7; 3T40-24 to 3T41-23. After two rounds of questions of Taylor, counsel for David D., after consultation with his client, elected to end questioning after moving transcripts of Taylor's January 2005 statements to the Hunterdon County Prosecutor and of her prior testimony in the September 2005 fact-finding hearing into evidence. (Pet. App. 129a). He thus concluded as a matter of trial strategy that he would prefer to argue the alleged discrepancies in Taylor's recorded statements than to have additional questions asked. (3T40-24 to 3T41-6). Counsel for David D. did not, at trial, in the Appellate Division nor in his submission to the New Jersey Supreme Court, identify a single additional question that he would have asked either of the minor witnesses in the event David D. had been present in the courtroom during cross-examination.

David D.'s counsel had the opportunity to have the court ask whatever non-objectionable questions he proposed, and to consult with David D. as many times as necessary in formulating those questions. He had the opportunity to review records of multiple prior interviews and testimony given by Taylor S. and, in fact, moved two transcripts into evidence, electing to comment on their alleged discrepancies rather than to have questions asked about them. (Pet. App. 129a). As to Wanda K., after counsel for David D. initially requested that she take the witness stand in the normal course, the court asked why Wanda K.

should not be questioned in the same way as Taylor S. Counsel for David D. responded, "That's going to be the next witness. Judge, should we just take our positions in the back of the courtroom again?" (Pet. App. 141a). The Appellate Division interpreted this as counsel for David D. suggesting that the same procedure be followed. (Pet. App. 22a).

The trial court explicitly found David D.'s testimony to be incredible, citing his demeanor, implausibility of various explanations on the stand, unwillingness to concede even documented facts, and demonstrated false statements he made to court-ordered evaluators, his employer, and his family. (7T13-8 to 7T19-21). In contrast, the trial court found both Taylor S. and Wanda K. believable. The judge characterized Taylor S. as giving direct answers and maintaining good eye contact. The court characterized the inconsistencies in statements given three, and then six, years after the event (which occurred when Taylor was ten) as minor, and in fact there were very few inconsistencies either with Taylor's original statements to authorities or with those she reportedly gave to her mother and stepfather on August 21, 2001. (Pet. App. 88a; 102a-106a; 164a-170a; 172a-178a).

Prior to the 2008 remand hearing in this matter, Wanda K. was contacted and provided a written statement of the incident with David D. (Da312, 2T17-7 to 23, 2T18-8 to 2T21-22). The statement described, and Wanda K. later testified, how she had gone to the D. home at David D.'s request to babysit

K.D. and M.D. because David D. had an appointment. (Pet. App. 146a). She did not remember the date, except that it was a weekday in the summer.[4] (Da312, *supra*). David D. took a shower and, clad only in a towel, returned to the room where then twelve-year-old Wanda was playing a video game waiting for the girls to finish their nap. (Id.; Pet. App. 146a). He then removed the towel and called out to Wanda K. to get her attention. (Da312, *supra*; Pet. App. 146a). Wanda K. told David D. she was uncomfortable and left; David D. told her to keep the incident "our secret." (Da312, *supra*; Pet. App. 147a).

As to Wanda K., the trial court found that

> [Wanda K.] was a very poised witness. She had good eye contact with the Court, forthright body language, forthright demeanor, she was sure of her answers. Her testimony was consistent.

[8T30-5 to 8T31-4].

In making an analysis of the admissibility of "other crimes evidence," the trial court found by clear and convincing evidence that the incident with then twelve-year-old Wanda K. happened and that it constituted evidence of David D.'s sexual interest in

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[4] Wanda K.'s stepmother testified that Wanda frequently babysat K.D. and M.D. the summer between Wanda's sixth and seventh grades, which would have been 2003. (2T11-13 to 21; 2T15-1 to 2; 7T5-8 to 18).

underage girls. (8T27-18 to 24; 8T30-20 to 8T31-4; 8T33-19 to 25).

The trial court found that David D. had sexually abused ten-year-old Taylor S. by touching her face with his penis, that he had exposed himself to twelve-year-old Wanda K., and that his demonstrated sexualized interest in underage girls supported a finding that David D. posed an unacceptable risk of sexual abuse to then seven-year-old K.D. and eight-year-old M.D. The court thus ordered that David D.'s contact with his daughters be supervised. (Pet. App. 201a).[5]

The Superior Court of New Jersey, Appellate Division affirmed the trial court, holding that the procedure employed to take the testimony of the minor witnesses was a proper exercise of discretion by the trial judge, and that the evidence supported a finding of "imminent and substantial risk" to K.D. and M.D. (Pet. App. 24a). The Supreme Court of New Jersey denied certification. *New Jersey Division of Youth and Family Services v. D.D.*, 200 N.J. 473, 983 A.2d 199 (2010). This matter remains open in the Superior Court of New Jersey, Family Part, Hunterdon County,

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[5] David D.'s claim that he has been "branded" as a child abuser means only that he is included in a confidential registry which the New Jersey Division of Youth and Family Services consults when additional referrals are received about a family, and which bars employment (post-hearing) at day care centers, residential treatment centers for children, and adoption agencies. N.J.S.A. 9:6-8.10a, N.J.S.A. 30:5B-6.2, N.J.S.A. 30:4C-27.22, N.J.S.A. 30:5B-25.3. Petitioner has never worked in such a field or indicated any desire to do so.

and orders for David D. to engage in treatment and for restrictions on visitation with his daughters remain in place.

REASONS FOR DENYING THE PETITION

Review of the decision in this matter is unwarranted in the first instance because the decision is an unpublished affirmance of an interlocutory order,[6] by a mid-level state appeals court, and would have no precedential value. *See*, N.J. Ct. R. 1:36-3.

Second, the procedure the petitioner seeks to mandate, in which the flexible procedure heretofore dictated by *Mathews v. Eldridge*, 424 U.S. 319 (1976), is discarded in favor of a directive ostensibly calculated to address the procedures to be employed in all civil child protection cases, no matter what the circumstances, age or emotional makeup of the child,

[6] An order finding abuse and neglect is interlocutory under New Jersey law, and does not become final until all issues are disposed of. *New Jersey Div. of Youth and Family Services v. L.A.*, 357 N.J. Super. 155, 164-66, 814 A.2d 656, 661-62 (App. Div. 2003). It appears, however, that since the procedure utilized to make a finding of abuse in this matter is the basis of the petition, and that this question is independent of additional rulings regarding mandated treatment, visitation, and/or custody that may be made, that the order under review would properly be deemed "final" for purposes of 28 U.S.C. § 1257(a). *See*, *Brady v. Maryland*, 373 U.S. 83, 85 (1963), *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

or history of the case, is not required by due process and does not properly take into account either the myriad and complicated factual scenarios presented by civil child abuse and neglect cases or the need to protect the safety and well being of the children who are the subjects of these actions. Ironically, however, one of the mandates proposed by petitioner was, in large measure, actually employed in this matter. Petitioner urges that the "criteria set forth in the New Jersey closed circuit TV statutes" (N.J.S.A. 2A:84A-32.4) be employed as a constitutional imperative. The New Jersey Superior Court, Appellate Division, concluded that the methodology employed by the trial court in this matter constituted the "functional equivalent" of the statutory procedure the petitioner seeks to mandate. (Pet. App. 36a).

States, and state court judges, are best suited to balance the rights of defendants and the needs of the subject children in civil child abuse and neglect cases within the confines of the Due Process Clause. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation and firmly establishes that what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972). *See also, Maryland v. Craig*, 497 U.S. 836, 855 (1990). In this case petitioner, while correctly identifying his own

fundamental liberty interest in the companionship and custody of his children, ignores the countervailing interest of both the State and those children in their safety and well being. That consideration, not present in the numerous criminal cases cited by the petitioner, calls for more flexible procedures. The numerous cases cited by petitioner as examples of approaches utilized by various state courts addressing disparate fact patterns demonstrate not only the efficacy and vitality of *Mathews v. Eldridge*, but the necessity of flexibility given the wide variety of circumstances courts charged with protecting children encounter.

Nor is there any merit to the assertion that the method employed by the trial court, wherein the judge asked rounds of questions proposed by the attorneys, means that the child was not cross examined, and that the absence of the defendant from the courtroom effects a denial of due process. The issue of questioning of witnesses by a judge based on questions proposed by counsel has arisen in the context of depositions conducted in accordance with Fed. R. Crim. P. 15. Each circuit court of appeals that has addressed the question has determined that, where questioning of a witness is done by a foreign judge based on questions supplied by the attorneys, due process and the Confrontation Clause are satisfied and the record of that deposition is not inadmissible as evidence due to a Sixth Amendment or Due Process Clause violation. *United States v. Salim*, 855 F.2d 944, 954-55 (2d Cir. 1988); *United States v.*

Sturman, 951 F.2d 1466, 1481 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992). While the vitality of these cases as they relate to criminal matters may be in question after the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), their analysis would still be applicable to this civil case. Similarly, each circuit that has addressed the issue concluded that the absence of a defendant from the taking of a deposition in a criminal case does not necessarily make that deposition inadmissible at trial. *See*, *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), *cert. denied*, 527 U.S. 1006 (1999); *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997); *United States v. Gifford*, 892 F.2d 263, 265 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Salim*, *supra*, 855 F.2d at 952.

Petitioner's complaint as to the adequacy of the trial judge's examination is, in reality, a second guessing of his own trial strategy. He had the option of continuing after a second round of questioning of both Taylor S. and Wanda K. but declined in both instances after consultation with his client. Nor did he take issue at trial with the substance or phrasing of anything asked by the judge. Apparently, he felt he could best make his point by identifying discrepancies in Taylor S.'s statements, which he pressed before the trial court and on appeal. The trial court concluded that, despite minor inconsistencies, Taylor S. was consistent, forthright and credible, while David D. was "frankly incredible," and the Appellate Division

deferred to those findings. (8T30-5 to 8T31-4, Pet. App. 23a).

The method by which evidence is presented in a civil child protection case is a matter particularly appropriate for resolution in the state courts within the boundaries set by *Mathews v. Eldridge*. Although a significant finding has been made against petitioner, due process has been afforded and it has not resulted in termination of his parental rights. Moreover, custody orders are always open to review by the trial court.

As the procedures employed by the trial court were fully protective of David D.'s due process rights as articulated in *Mathews* and demonstrated in the record below, review by this Court is not warranted. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the petition of David D. for a writ of certiorari should be denied.

Respectfully submitted,

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